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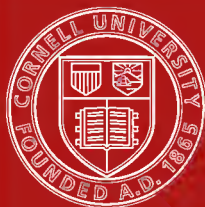
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THE

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PROVISIONAL REMEDIES

OF THE

CODE OF PROCEDURE.

BY

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P R E F A C E .

THE Code of Procedure, having divided Remedies in the Courts of Justice into *Actions* and *Special Proceedings*, has a subdivision under the first head, termed, "Of the Provisional Remedies in *Civil Actions*." These form the subject of the Seventh Title of Part Two; and this Title is separated into five chapters. These chapters comprise the important subjects of ARREST AND BAIL; CLAIM AND DELIVERY OF PERSONAL PROPERTY; INJUNCTIONS; ATTACHMENTS; and of PROVISIONAL REMEDIES; embracing Receivers, and several miscellaneous proceedings.

It is proposed to state, in the following treatise, the provisions of the Code upon these subjects, the judicial expositions which they have received, and the general law upon them.

ERRATA.

Page 7, line 23, for " 10 Howard," read " 10 Barbour."

" 39, line 31, for " 11 Sandf.," read " 4 Sandf."

" 59, line 6, after word " party," insert " shall."

" 76, line 6 from bottom, insert word " for," after word " bail."

PROVISIONAL REMEDIES.

CHAPTER I.

ARREST AND BAIL.

Introductory.—The principles of the feudal system exempted the persons of feudatories and vassals from an arrest for civil injuries. The conditions of their tenure, or the obligations of their relation demanded their personal attendance upon the signal for defence or conquest; and thus the necessities of the monarch or feudal lord produced the same result as modern liberality or wisdom has achieved.

Accordingly, in England the redress by an arrest of the person, for a civil injury unaccompanied with force, began when feudalism had commenced to fade. The first statute was that of the 52d of Henry III., providing, that if bailiffs who ought to make accounts to their lords do withdraw themselves, and have no lands or tenements whereby they may be distrained, then their bodies shall be taken, so that the sheriff shall cause them to make their account. Mr. Reeves, indeed, states that even in that reign, the ordinary process in personal actions included a writ to the sheriff *quod habeat corpus*.¹

The very important and beneficial regulations of the Statutes Merchant² contained the next step in the progress of this right.

¹ History of the English Law, Vol. II. p. 439.

² 11 Ed. I., cap. 1; 13 Ed. III., stat. 3, chap. 1.

By the operation of these acts, the body could be taken, after ineffectual process against the chattels and lands of the debtor, who had entered into the specialty provided by them.

The 25th of Edward III., ch. 17, extended a *capias* to actions of debt and detinue; and that of 19 Henry VII., ch. 9, to all actions upon the case in any of the courts, the same as in actions of trespass or debt.

A series of enactments then took place, regulating the right of arresting, the taking of bail, and the preventing of abuses. The leading statutes are: 23 Henry VI., ch. 9, called the Statute of Main-prize; the 13 of Charles II., Stat. 2, ch. 2; the 12 of Geo. I., ch. 29; the 21 of Geo. II., ch. 3; the 51 Geo. III., ch. 174, § 1; and 43 Geo. III., ch. 46, § 2. The provisions of these acts are stated in Mr. Petersdorf's Treatise on the Law of Bail (p. 8, ch. 89; Law Library, vol. 10, p. 58).

The opinion of Chief Justice Tindal in *Chambers vs. Bernasconi* (6 Bingham, 498, 1830) contains an instructive though brief history of the law of arrest and bail. He says: "The courts have always exercised, and have the power to exercise, a general control over the right of the plaintiff to hold to bail. Before the statute of 12 Geo. I., ch. 29, the power of arresting depended on the practice of the court only, modified from time to time by rules of the court for that purpose. Thus the practice of not allowing a second arrest for the same cause of action; of allowing the plaintiff to hold to bail in actions of trover and trespass, have no other foundation than the rules of court. And the statute before referred to took away no authority which the court antecedently possessed, except that it prevented the issuing of bailable process for a smaller sum than £10. The courts, therefore, may still interpose, and in various instances have interposed, in a summary way, and discharged the defendant on common bail." He cites several cases, and among them *Nizetich vs. Bonacich* (5 Barn. & Ald. 904), where the Court of King's Bench discharged the defendant, when it appeared from the plaintiff's own letters, that the defendant was his creditor to a considerable sum; also *McGinness vs. McCurlin* (6 Dowling & Ryland, 24).

The statute of Geo. I. referred to, provided, that when the plaintiff's cause of action amounted to ten pounds or upwards, an affidavit of such cause of action was to be made, and the sum

was to be indorsed on the process ; for which sum and no more the sheriff was to take bail. Without such affidavit and indorsement, no arrest could be made. The act of 51 Geo. III., ch. 21, extended the sum to fifteen pounds, besides costs. But the statute of 1 and 2 Victoria, ch. 110 (1838), made a great change in the law. It is entitled "An act for abolishing arrest on mesne process in civil actions, except in certain cases," &c. The recital is, "Whereas the present power of arrest upon mesne process is unnecessarily extensive and severe"—and it provides, that "from and after the time appointed for the commencement of this act, no person shall be arrested upon mesne process in any civil action in any inferior court whatever ; or (except in the cases and in the manner hereinafter provided for) in any superior court."

The 3d section enacts : "That if a plaintiff in any action in any of Her Majesty's superior courts of law at Westminster, in which the defendant is now liable to arrest, whether upon an order of a judge, or without such order, shall, by the affidavit of himself or of some other person, show to the satisfaction of a judge of one of the said superior courts, that such plaintiff has a cause of action against the defendant or defendants, to the amount of twenty pounds or upwards, or has sustained damages to that amount ; and that there is probable cause for believing that the defendant, or any one or more of the defendants, is or are about to quit England, unless he or they be forthwith apprehended, it shall be lawful for such judge by official order to direct, that such defendant or defendants so about to quit England, shall be held to bail for such sums as such judge shall think fit, not exceeding the amount of the debt or damages."

A *capias* is issued upon this order. Some other of the provisions of the act, and cases upon them, are noticed under particular sections of this chapter.

By the 14th and 15th of Victoria, ch. 53, it is provided, that certain officers in different parts of the kingdom may grant a warrant of arrest, where the debt is over £20, and there is probable cause for believing that such debtor, unless he be forthwith apprehended, is about to quit England with intent to avoid or delay the said creditor, or with intent to remain out of the jurisdiction of the courts of law in England so long, that the creditor will or may be delayed in the recovery of his debt.

Under the former statute, it was requisite to obtain the order for a warrant from a judge.

The early English statutes and practice formed the basis of our own system before the Revised Statutes of 1830. The act of the 16th February, 1787, "for preventing of vexations and oppressions by arrest" (1 Greenleaf, 339), was founded upon the statutes of Henry VI., of George I., and George II.

The Revised Laws of 1813 contained similar provisions. (1 R. L. 424, § 13, 14.) The Revisers of 1830 (3 R. S. 719) say: "The law respecting arrests stands upon a singular footing in this State. The 14th section of our statute (1 R. L. 424) is taken from the English act of 13 Charles II., ch. 2 (*vide* Tidd 36). But by the act of 12 Geo. I., ch. 29, an affidavit of the cause of action was required, in order to hold to bail for any sum over ten pounds. The decisions on the latter statute have guided our own courts in the construction of our act, which required only that the certainty and the cause of action should be particularly expressed. If this requisite is complied with, it would seem that the statute would be satisfied, whatever was the cause of action. But its general terms have been very properly limited by the courts. It would seem very expedient that the cases in which a citizen is to be deprived of his liberty, should be clearly defined."

The Revised Statutes of 1830 (2 R. S. 348, §§ 4-24) embodied the existing provisions and rules of law, and provided for nearly every case, both as to the right to arrest, and the course of proceeding. Thus, by section 7, in the following cases the defendant could be held to bail of course, and without any special order for that purpose:

(1.) In all actions of debt, except such as shall be brought upon a judgment rendered in a suit in which the defendant had been held to bail; and except such as shall be brought upon any bail bond or recognizance of bail, or upon any replevin or other bond, in which any surety shall have joined, taken in the course of judicial proceedings, or by virtue of any statute.

(2.) In all actions upon contracts for the payment of any money, the performance of any service, or the delivery of any property, where the demand or damages shall be certain, or can be reduced to certainty.

(3.) In actions of trover and in actions of trespass for taking of personal property, and in actions of replévin, in the cases provided by law.

(4.) In actions for trespass upon land.

By section 8th, "in all cases, other than such as are herein provided for holding a defendant to bail, an order requiring such bail may be granted by a judge of the court in which the writ is issued, in the cases, according to the practice established in the Supreme Court."

The provisions of this act are referred to in several instances in the following treatise, where they have been considered either as not repealed, or by way of illustration.

Soon after the Revisers had elaborated this system upon the subject of arrest and bail, the important act of April 26th, 1831, was passed. It was entitled "An act to abolish imprisonment for debt, and to punish fraudulent debtors." The first section provided, "that no person shall be arrested or imprisoned, on any civil process out of any court of law, or any execution issuing out of any court of equity, in any suit or proceeding instituted for the recovery of any money due upon any judgment or decree founded upon contract, or due upon any contract express or implied, or for the recovery of any damages for the non-performance of any contract."

Section 2 excepted from the preceding section any person who had not been a resident of the State for at least one month previous to the commencement of the suit against him; proceedings as for contempts to enforce civil remedies; actions for fines and penalties; or on promises to marry; or for moneys collected by any public officer; or for any misconduct or neglect in office, or in any professional employment.

Section 3 provided for arresting a party by warrant of a judge or officer, in cases in which, under the preceding provisions, a defendant could not be arrested or imprisoned. And section 4 specified the manner in which such a warrant could be obtained, and the cases in which it could be issued.

An affidavit was to be made by the plaintiff, or some other person or persons, of a demand or debt being due from the defendant, amounting to more than fifty dollars, and specifying the nature and amount thereof, as near as might be, and establishing one or more of the following particulars:

(1.) That the defendant was about to remove any of his property out of the jurisdiction of the court in which such suit was brought, with intent to defraud his creditors; or,

(2.) That the defendant had property or rights in action which he fraudulently concealed; or, that he had rights in action, or some interest in any public or corporate stock, money, or evidences of debt, which he unjustly refused to apply to the payment of any judgment or decree, which shall have been rendered against him, belonging to the complainant; or,

(3.) That he had assigned, removed, or disposed of—or was about to dispose of—any of his property, with the intent to defraud his creditors; or,

(4.) That the defendant fraudulently contracted the debt, or incurred the obligation, respecting which such suit was brought.

In following up the history of our legislation upon this subject, it will be sufficient to advert merely to the act of 1837 (ch. 418); to the act of April 25, 1840 (ch. 165), which repealed the provision in the second section, that the first section should not extend to a person not a resident for one month previous; to the act of May 13, 1845 (ch. 214), providing for the putting in and perfecting bail by a party arrested, and subjecting the defendant to imprisonment on an execution, who may have perfected bail; to the act of May 12, 1846 (ch. 209), providing that the provision of the statute of May 13, 1845, as to bail, should not apply to cases of a person imprisoned for either of the frauds specified in either of the first three subdivisions of the fourth section of the act of 1831; to the act of 1847 (ch. 300), denying imprisonment for non-payment of interlocutory costs, with certain exceptions; and to the act of February 18th, 1848 (ch. 48, § 2), giving the right to make the application for a warrant to any judge of a court of record, in the county in which the judgment had been docketed.

The exposition of the system raised by these various statutes, and of the obscurities, contradictions, and difficulties attending them, will be found in the leading cases of *Spear vs. Waddell* (1 Comstock, 149), and *Hall vs. Kellogg* (2 Kernan, 325).

The Code has preserved these enactments in force (§ 178), and many of its provisions are so similar as to make the decisions upon them applicable. They will be noticed in their proper places.

It remains to be observed that the system of the Code is one in which an arrest is peculiarly and exclusively auxiliary to the action of the plaintiff, the particular creditor, and available to him, and for the enforcement of his demands, solely.

Section 178.

"No person to be arrested, except as prescribed by this act.

"No person shall be arrested on a civil action, except as prescribed by this act ; but this provision shall not affect the act to abolish imprisonment for debt, and to punish fraudulent debtors, passed April 26, 1831, or any act amending the same ; nor shall it apply to proceedings for contempts."

This section has remained in the same language from the enactment in the Code of 1848. It was at first the 153d section. Its language is peremptory. It makes the liability of a party to arrest, in a civil action, to depend upon his being brought within the provisions of this chapter, or of the act of April 26, 1851, and its amendments, or under proceedings for contempt.

Ne exeat.—It seems difficult, at first view, then, to comprehend the principle upon which it was in some cases held that a writ of *ne exeat* could be still resorted to. All suits in equity in which this equitable bail could have been had were civil actions under section 6 of the Code.

In *Forrest vs. Forrest* (5 Howard P. Rep. 125 ; 10 Howard, 46), the subject was carefully examined by Mr. Justice Edmonds, and the conclusion arrived at was that the writ was not abolished as a provisional remedy. Whether the other judges (Edwards and Mitchell) concurred in this view, is not stated. The writ was discharged upon the particular circumstances of the case.

In *Bushnell vs. Bushnell* (7 Howard, 389, and 15 Barbour, 399), the same conclusion as to the writ remaining in force was arrived at by the General Term of the Second District.

In *Ulman vs. Ulman*, May, 1860, the right was again recognized, in the Supreme Court of the First District, at Special Term.

In *Fuller vs. Emeric* (3 Sand. Sup. Ct. Rep. 607), the Superior Court of the city of New York determined that the Code had abolished the writ. This was in January, 1849.

By the 200th section of the Code of 1848, and the 244th of that of 1849, it was provided that, until the Legislature should otherwise provide, the court might appoint receivers, and direct the deposit of money or other thing in court, and *grant the other provisional remedies now existing, according to the present practice, except as otherwise provided in this act.*

By the amendment of 1851, the clause italicized was omitted. It was to some extent relied upon by the court in *Forrest vs. Forrest*, November, 1850.

Act of 1831.—The act of 1831 is retained in force expressly, and a warrant may issue in all the cases prescribed by it. In several instances the Code allows an arrest in the same cases, and then it is concurrent.¹

In *Kenderburgh vs. Morgan*,² Chief Justice Bosworth, after commenting upon the harmony which existed between the many provisions of the act of 1831 and those of the Code, observed, "that they should be construed as consistent in spirit and design, when no violence is done to the natural import of the words. Under both an arrest cannot be had except by order in an action. The act declares that it shall not be, and the Code does not provide that it may be, unless such provision is found in § 288."

That section was then examined, and it was held that it contemplated that the question had been determined before execution. See the case and decision, *post*, title "*Arrest on Execution*," after section 205.

Contempts.—The section now discussed expressly retains in force imprisonment under the laws relating to contempts. See 2 R. S. 531; 2 R. S. 278. See, also, Code, § 471, and *The People vs. Compton*, 1 Duer, 514.

¹ *Gregory vs. Weiner*, 1 Code Reporter, N. S. 210; *Corwin vs. Freeland*, 6 Howard's Pr. 241; *Perkins vs. Warren*, *ibid.* 348.

² Superior Court, Feb. 1860, Special Term, 18 Howard Pr. Rep. 469.

Section 179.

"Cases in which the defendant may be arrested.

"The defendant may be arrested, as hereinafter prescribed, in the following cases :"

FIRST SUBDIVISION.—"1st. In an action for the recovery of damages on a cause of action not arising out of contract, where the defendant is not a resident of the State, or is about to remove therefrom ; or where the action is for an injury to person or character ; or for injuring, or for wrongfully taking, detaining, or converting property."

The 150th section of the Code of 1848 provided in the first subdivision only as follows : "In an action for the recovery of damages on a cause of action not arising out of contract."

In 1849 the subdivision was amended as above, and has so continued.

The first case under this first subdivision is, when the action is for the recovery of damages, does not arise out of contract, and when the defendant is not a resident of this State. When all these circumstances concur, the defendant may be arrested.

Actions not arising out of contract.—In this as in some other cases, we are led for our guidance to the old distinction between actions *ex contractu* and actions *ex delicto*.

So in the English Common Law Procedure Act of 1852, the distinction between causes of action "on contracts" and "for wrongs independent of contracts" is preserved. (Lush's Stephens' Practice, 106.)

A tort is a wrong independent of a contract. Actions in *form ex delicto* are for injuries to the absolute or relative rights of persons, or to personal or real property. (Chitty Pl., vol. i. p. 60.)

The observations of Judge Swift upon actions, and their divisions, may be usefully cited. "An application to a court of law for the redress of a wrong, is called a suit or action, which may be defined to be a prosecution before a court of law for the recovery of one's right. Actions are divided into three kinds—per-

sonal, real, and mixed. Personal actions are those by which a man claims damages as a satisfaction for the non-payment of some debt, or the non-performance of some duty; or for some injury done to his person, or to his property, either real or personal. Real actions are those which concern real property, and are brought to recover the possession of lands or tenements, by the owner, and in which he recovers the land only, without any damages. Mixed actions are those which are brought to recover the possession of lands and tenements, and also for the recovery of personal damages for the wrong sustained. Personal actions are subdivided into two kinds—actions that are founded upon torts or wrongs, and actions that are founded upon contracts. Actions that are founded upon torts are further divided into two kinds—one is trespass with force and arms, where the action complained of is immediately injurious, and accompanied by some degree of actual force and violence, as assault and battery or false imprisonment. The other is trespass on the case, where the act is not accompanied with force or violence, and is injurious in its consequences only, as slander, malicious prosecution, trover, and the like. Actions founded on contract are to recover damages for non-payment of some debt, the non-performance of some contract, or the neglect of some duty. Such are the actions of debt, covenant, account, assumpsit, and book debt.” (Swift’s Digest, revised edit. of 1851, p. 481, 482.)

Whatever may be the true extent of section 69 of the Code abolishing the previous forms of actions, the section now considered shows, that the radical distinctions as to the nature of actions has not been obliterated.

In *Fowlers vs. Abraham* (3 E. D. Smith, 13), the action was an old action on the case; for deceit in a warranty of a sale of goods which was false. It was held that although an action of assumpsit had to a great extent superseded such an action, yet it could still be resorted to; that the allegation of fraud was not necessary. If inserted in the complaint, it need not be proven. The warranty and its falsehood were alone sufficient, if duly established. Yet this action was one arising out of contract, and there could be no arrest of the body without a special order.

In *The People vs. Willett* (26 Barbour, 78), Mr. Justice Peabody held, that an action on the custom against an innkeeper for

the loss of the baggage of his guest, was founded on tort. It is not for injuring, or wrongfully taking, detaining or converting property; but it is for tortious negligence in keeping the property. Hence, that, in such an action, the defendant could not be arrested, except when, in addition to the facts constituting the cause of action, the defendant was a non-resident of the State, or about to remove therefrom.

In *Smith vs. Corbiere* (3 Bosworth's Rep. 634), the cause of action was the false and fraudulent representation of another's responsibility, which induced a sale of goods. It was held not to arise out of contract; to be a mere personal tort; that the defendant could not be arrested unless he was a non-resident, or about to remove from the State. An arrest could not be sustained under subdivision 4 of section 179, for the obligation there spoken of was one arising *ex contractu*, on which an action will lie, whether contracted with or without fraud. It had no relation to a cause of action which arises exclusively out of the fraud of the party, and must fail, if the fraud is not proved.

Non-residence.—Under the clause now considered, the defendant must also be a non-resident. The question of non-residence is very fully examined under the 227th section of the Code, title "*Attachment*." The phrase, "who is not a resident," is there used. The subject having been much discussed in the Superior Court of New York, under that section, the author refers to the discussion there, although it would have been more orderly to have treated of it here.

In *Fullerton vs. Fitzgerald* (18 Barbour, 441), the action was to recover possession of real estate, and of the rents and profits while in the defendant's occupation. The plaintiff had judgment for the property, and also for \$70 for damages. After execution against property, an execution against the person was issued, and the defendant imprisoned. The execution was set aside, and the defendant discharged. It was ruled, that it was enough if the right to arrest appeared on the face of the judgment; it need not on the execution. It was also held, that the case could not be in any way treated as within the first subdivision of § 179 of the Code.

Intention to remove from the State.—If the defendant is about to remove from the State, and the action is for the recovery of damages, on a cause of action other than a contract, he may be arrested.

The fact of his being about to remove from the State, implies a residency within it, and an intention permanently to leave it, and permanently to reside elsewhere. In other words, a change of domicile must, I apprehend, be designed.

In *Brophy vs. Rogers*¹ (7 Legal Observer, 152), the defendant was arrested in an action of slander, upon an affidavit that he was about to depart for California. He was discharged by order of the Special Term. On appeal the court said: "Going to California is not removing within the meaning of the act. It means a removal for a change of residence. His intention to remove with some permanent view must appear in the affidavit; and if it be shown by the defendant, that he had no intention to remove with a view to a change of his residence, the order will be revoked." The order of discharge was affirmed.

The English act of 1-2 Victoria, noticed in the introductory remarks, allows the arrest when *the defendant is about to quit England*, unless he be forthwith *apprehended*; and it is held, that it is sufficient to show generally that the defendant is about to quit the country forthwith, without suggesting his object, or how long he is to be absent. A person about to return to his residence in Ireland is as liable to be arrested as a trader going abroad to avoid his creditors.²

Every departure, however, is not within the act. A captain of a channel-vessel going upon his usual voyage is not liable to arrest.³

In *Hargreaves vs. Hayes* (3 Queen's Bench, 486; 30 En. L. & Eq. Rep. 272), Justice Coleridge said: "The object was to arrest the party who probably would not be in the country when the judgment was recovered. It is necessary that it should appear to the satisfaction of the judge, from the facts stated, that the debtor means to go abroad promptly. It does not follow that the party should swear that the debtor will go abroad unless he is immediately arrested."

It deserves notice that the ground thus taken was the rule before the Code. In *Brooks vs. M'Lellan* (1 Barbour Sup. Ct. Rep. 247), Justice Edmonds (where the arrest had been made in

¹ Common Pleas, General Term, 1849.

² *Lamond vs. Eiffe*, 3 Queen's Bench, 910; *Linchin vs. Willan*, 7 Dowl. Pr. Ca. 11.

³ 1 Dowl. Pr. Ca. N. S. 849.

an action for deceit) observed : "The rule for holding to bail for actions of tort is, that something more must be stated than merely a cause of action. Some special cause must be shown in addition ; such as that the defendant is a non-resident, or is about to depart out of the State, and the like. A resident of this State cannot, in such cases, be held to bail, unless evidence is produced to justify the apprehension that he will not be within the jurisdiction of the courts to answer the demand when judgment shall be obtained against him."

By the statute of New Hampshire,¹ no person shall be arrested upon any writ or execution founded on any contract made after the 1st of March, 1841, unless the plaintiff, or some person in his behalf, make an affidavit before a justice, on the back of such writ, that in his belief the defendant is justly indebted to him in a sum exceeding \$33 33, and that he conceals his property so that no attachment or levy can be made ; or that there is good reason to believe he is about to leave the State to avoid the payment of his debts.

Section 9 provides for a prompt trial of the grounds of the arrest, upon the defendant's affidavit, and any other evidence.

Section 11 prevents the discharge from affecting the debt.

In *Stevenson vs. Smith* (8 Foster's Rep. 12), it was held that the statute applied to the citizens of New Hampshire, about to abandon the State purposely to avoid the payment of their debts. It could not apply even to such citizens, leaving the State for temporary purposes of business or otherwise, with the intent to return. Much less could it apply to a citizen of another State, coming into New Hampshire for a temporary purpose (in that instance to attend the funeral of a relative), and being there only for such purpose.

Injury to person.—The next clause of this subdivision relates to an action of a specific nature, viz., for an injury to person or character. In such an action the defendant may be arrested.

By the English law, injuries to the person requiring necessarily an action *ex delicto* for uncertain damages, a judge's order was necessary to hold to bail. A judge at chambers, on an affidavit containing a positive statement of the injury, would order

¹ Compiled Statutes of 1853, ch. 197, § 8.

special bail. Thus, it was done for battery or mayhem where it was obvious the damages would exceed fifteen pounds. (Petersdorf, 38.)

By the Revised Statutes of 1830 (2 R. S. 348, § 9), a special order to hold to bail was to be obtained for injuries to the person.

There appears to have been a rule of the Superior Court of New York, fixing the sum of five hundred dollars as the amount in which a party should be held to bail in ordinary cases of assault and battery. (Ballingall *vs.* Barnie, 1 Hall's Rep. 237.)

In the case of an assault and battery charged to have been committed by the wife alone, it was held that the married woman was not liable to arrest at all; and that the husband could not be arrested in an action founded on the contract or tort of the wife. (Anon, 1 Duer, 613.)

Crim. con.—In *Delamater vs. Russell* (4 Howard, 234), it was held by Justice Parker that, in an action for criminal conversation with the plaintiff's wife, the defendant could be arrested. He thought the injury complained of was one to the person of the plaintiff. It was an invasion of his personal rights. The action was for depriving the plaintiff of the comfort, aid, and assistance of his wife. Injuries may be offered to a person considered as a husband: citing 3 Black. Comm. 139.

In *Shaws vs. Schwarzwaelder* (Special Term Superior Court, February, 1860, before Chief Justice Bosworth), the action was by the husband for criminal conversation with his wife. An arrest on her affidavit of the facts, and his on information and belief, was granted. The learned judge doubted whether it could be termed an injury to the person within the subdivision, though one to personal rights. But he yielded to the authorities cited; and observed that if a construction so limited be given, that an order of arrest could not be made on proof of a cause of action, then no *ca sa* could issue on the judgment. It was difficult to believe that the Legislature intended to abolish this remedy.

In *Hadderwuh vs. Catmur* (Barnes' Notes, 61), and in *Dyott vs. Dunn* (2 Chitty Rep. 72), a defendant was held to bail, by order, in an action for *criminal* conversation.

In *Bulloch vs. Jenkins* (2 En. L. and Eq. Rep. 195), it was ruled that the affidavit on which to hold a defendant to bail, in

an action for criminal conversation, should properly specify the amount of damages sustained; but the court in banc refused to discharge a judge's order to arrest, because the facts stated in the affidavit appeared to warrant his conclusion, that damages had been sustained over £20.

Seduction.—In *Carter vs. Drake* (10 Wendell, 618), the defendant was held to bail on a *capias* in an action for the seduction of the plaintiff's daughter.

In *Taylor vs. North* (3 Code Reporter, 9), the action was for seduction. Mr. Justice Mason, with the concurrence of his colleagues, held that the defendant could be held to bail under the 179th section, adopting the reasoning of Justice Parker in *Delamater vs. Russell*.

False imprisonment.—In *Gordon vs. Upham* (4 E. D. Smith, 9), the action was for false imprisonment. The defendant had been arrested and held to bail. Upon a motion to discharge the order, he showed that he had brought an action for breach of a contract to enter into partnership, and had obtained the then defendant's arrest on affidavits of an intention to remove his property in order to defraud creditors, and especially the plaintiff. The defendant had been discharged. But, on the present motion, it was held, that the facts in the original cause made a reasonable ground of suspicion, a case of probable cause, which was an answer to the present action. On this, and that the damages could only be nominal, the defendant was discharged.

Injury to character.—The next case under this subdivision is for an injury to character.

The actions in which compensation for an injury to character is usually sought are slander, libel, and malicious prosecution, where the charge has been something of a criminal nature.

In *Vanderpool vs. Kissam* (4 Sand. Sup. Ct. Rep. 715), the action was for a malicious prosecution, and it was held that the facts which are relied upon as *prima facie* evidence of a want of probable cause, must be set forth in the affidavit, so as to enable the judge to draw the proper conclusion of law. An affidavit stating only in general terms the existence of malice and the want of probable cause, was insufficient. Upon this ground, and upon affidavits, on the part of the defendant, proving the existence of probable cause, a motion for his discharge was granted.

The case of *Roberts vs. Bayles* (1 Sandf. S. Ct. Rep. 47) may be usefully referred to upon the question of what is, and what is not, evidence of probable cause. See also *Bulkeley vs. Kettletas*, 2 Selden, 384.

Injuring, taking, detaining, or converting property.—The arrest for injuring, wrongfully taking, detaining, or converting property is in effect the holding to bail in the old actions of trespass, detinue, or trover and conversion.

Before a rule adopted by all the courts in the 48th of George III. the defendant might have been held to bail in trover or detinue without a special application to the courts; but by that rule an order from one of the judges was made necessary. (Petersdorf on Bail, p. 38.) See the rule at length in 9th East, 325.

Under the Revised Statute of 1830, trover, trespass for taking personal property, trespass upon land, and replevin in the cases provided by law, were bailable as of course. (2 R. S. 368, § 8, subd. 3, 4.) Trespass for injuries to the person and trespass on the case were bailable by special order. (*Ibid.* § 9.)

In *Chappel vs. Skinner*,¹ Justice Welles observed, that the first subdivision of section 179 authorized the arrest of the defendant, where an action is for injuring, or for wrongfully taking, detaining, or converting property, by which is intended an action to recover damages for such injury, taking, detaining, or converting, answering to our late actions of trespass, case, trespass *de bonis asportatis*, and trover, and not an action to recover possession of personal property. Cases may arise where the plaintiff has his election to proceed under chap. 2, title 7 (Claim and Delivery), to recover possession of the property, or to recover damages for the taking or detention. Where the plaintiff has once made his election he must abide by it. He has not a right to commence his action, hold the defendant to bail, and afterwards have the property delivered to him.

In the *Northern Railroad Co. vs. Carpenter* (3 Abbott, 259; 13 Howard, 222), it was held, by Justice Davis, that where certain certificates of stock had been embezzled, and fraudulently converted to the use of the defendants, there was a willful injury to property, which authorized the arrest of a female under subdivision 5.

¹ 6 How. Pr. Rep. 338.

In *Tracy vs. Leland* (2 Sandford, Sup. Ct. Rep. 729), it was held that secreting and detaining a piano was not injuring property within this subdivision, although breaking or damaging it might have been.

The *People vs. Willett* (6 Abbott's Rep. 37) decided that an action against an innkeeper, on his common-law liability, for negligent loss of baggage, is not an action for injuring or wrongfully taking, detaining, or converting property, within the meaning of section 179. In such an action, the defendant could only be held to bail on proof, in addition to the facts constituting the cause of action, that the defendant is a non-resident of the State, or is about to remove therefrom.

SECOND SUBDIVISION.—The defendant may be arrested—

“In an action for a fine or penalty; or on a promise to marry; or for money received, or property embezzled or fraudulently misapplied by a public officer; or by an attorney, solicitor, or counselor; or by an officer or agent of a corporation or banking association, in the course of his employment as such; or by any factor, agent, broker, or other person in a fiduciary capacity or for any misconduct or neglect in office, or in a professional employment.”

For fine or penalty.—This clause has remained the same as it was enacted in 1848.

The 2d section of the act of April, 1831, in like manner retained or authorized the right to arrest in an action for fines or penalties.

A distinction appears to be taken in English cases between an action on a penal statute, where the penalty is in the nature of an amercement for the non-performance of a duty, or commission of a prohibited act, and actions on remedial statutes, where the penalty is to remunerate the injured party, and also to punish the aggressor. In general, a party could not be holden to bail in the former cases.¹ In the latter class, bail may be required.²

The distinction between the statutes is said to be this: that

¹ *Presgrave vs.* —, 1 Comyn's Rep. 75; 1 Bacon's Ab. 210; Petersdorf on Bail, p. 36.

² *Turner vs. Warren*, 2 Strange, 1079. *Carrill vs. Cochran*, 12 Mod. 295.

the statute is remedial where the action is brought by the party injured, but penal when brought by a common informer. (2 Bl. Rep. 1227.)

Promise to marry.—This clause is the same as it was passed in 1848.

It has been held that it does not authorize an arrest of a female who has made such a promise. It is controlled by that part of subdivision 5 which makes a female liable to arrest only in the cases there mentioned. (*Shiefe vs. Tuppey*, 3 Code Rep. 23.)

The act of April, 1831, permitted also an arrest in such a case (§ 2). In *Bromley vs. Town* (1 Hill, 373), it was held that a judge's order to arrest was necessary. The statute (2 R. S. 348, § 78) had changed the rule which prevailed when the case of *Bunting vs. Brown* (13 Johns. Rep. 425) was decided. The act to abolish imprisonment for debt did not touch the question. The second section excepted such promises from the first section, but left the question of bail as it was before.

Money embezzled by public officer.—For money received, or property embezzled or fraudulently misapplied, by a public officer, in the course of his employment as such, an arrest may be had.

The Code of 1848 has merely the words, "for moneys collected by a public officer in the course of his employment as such." The clause, as it now stands, was adopted in 1849.

The act of April, 1831, authorized imprisonment "for moneys collected by any public officer, or for any neglect in office."

In *Peel vs. Elliott* (16 Howard Pr. Rep. 480, 481), the defendant was in the employ of the British Government, was arrested for moneys embezzled in England, and in an action by an officer empowered by a British statute to sue. The affidavit, stating fully the sources of the information, was sworn to by an attorney here. Justice Ingraham denied a motion to vacate the order, giving liberty to renew it on affidavits of the defendant. Justice Davies heard a renewed motion upon affidavits on both sides, and denied the application. On appeal, the question was adverted to by Mr. Justice Hogeboom, but considered as not arising, whether the defendant, for acts done in England, amounting to a fraud upon the English Government, could be held to an arrest here as a public officer; or whether our statute is not lim-

ited to cases of misconduct occurring within its own jurisdiction, or towards its own government. It was held, after examining the nature of an English extent, that the original cause of action was not extinguished by it, and the present action was still one to recover money or property embezzled by a public officer.

The case of *The Republic of Mexico vs. Arrangoiz* (5 Duer, 604), which received much attention in the Superior Court of New York, involves the point that a public officer of a foreign State may be arrested in an action by that State against him. If such foreign State, or its legalized officer, may sue in our tribunals, it seems difficult to find a ground for excluding it from all the provisional remedies attending such suit which are open to other suitors.

Fraud in an attorney, &c. — A party may be arrested for money received, or property embezzled or fraudulently misapplied, by an attorney, solicitor, or counselor, in the course of his employment as such.

The Code of 1848 had only the clause "for moneys collected by an attorney, &c., in the course of his employment as such." The change to the present form was made in 1849.

Under the act of April, 1831, as originally passed, it was held, in *Stage vs. Stevens* (1 Denio, 267, 1845), that an attorney could be arrested in an action for money collected by him. This was under the clause declaring that the exemption should not extend to cases of actions for misconduct or neglect in any professional employment. What was said in *Bohanan vs. Peterson* (9 Wend. 503) could not be regarded as the true meaning of the statute.

By the act of May 9, 1846, ch. 150, it was enacted that in all actions upon contract for moneys received by any attorney, or by any other male person, in a fiduciary capacity, the defendant or defendants should be liable to imprisonment, in the same manner as in actions for wrongs.

In *Yates vs. Blodget* (8 Howard's Pr. Rep. 278), it was held that an attorney who resided and practiced in another State, and there received moneys for his client, could be arrested here. The action was founded not so much upon a breach of contract as the violation of professional duty.

Fraud of an officer or agent of a corporation. — An arrest may be had for money received or property embezzled by an offi-

cer or agent of a corporation or banking association, in the course of his employment as such.

The Code of 1848 did not contain this clause. It was added in 1849, and has so continued since.

In *Crook vs. Jewett* (12 Howard Pr. Rep. 19), Mr. Justice Morris held that a fraudulent or illegal sale of coal mines and steamships for an inadequate price, and apparently for the individual benefit of the officers, was a misapplication and embezzlement of the property of the corporation by the officers, and justified an arrest under the second subdivision.

Agent, factor, &c. — Fiduciary capacity. — “For money received, and property embezzled, or fraudulently misapplied, by any factor, agent, broker, or other person in a fiduciary capacity,” an arrest may be granted.

The Code of 1848 had only the clause, “for moneys collected by an attorney, solicitor, or counselor, or any person in a fiduciary capacity.” The amendment of 1849 added the enumeration of “factor, agent, and broker.” The subdivision has remained unchanged in this particular.

The first case which occurs under this clause is the one of a mere reception of money by an agent, &c., in a fiduciary capacity, apart from any fraud. The case of *Schadle vs. Chase* (16 Howard Rep. 413) is an example of this class. The defendant received the plaintiff's money for a special purpose. The defendant stated an agreement, by the plaintiff, that he might apply a portion to another person's claim. The demand revoked the agency for either purpose, and warranted an arrest, though there was no fraud or intentional breach of trust.

Burchans vs. Casey (4 Sandf. Sup. Ct. Rep. 757) is of a similar character. Money was delivered to the defendant to apply in payment of rent, which he promised to do, and neglected. His arrest was sustained at General Term.

In *Turner vs. Thompson* (2 Abbott's Rep. 444) the plaintiff employed the defendant to make sales of his goods, and to render weekly returns of sales, and pay over the proceeds, which he neglected to do. Mr. Justice Davies considered the case to be within the letter and spirit of the section, and supported an arrest.

Stoll vs. King (8 Howard's Rep. 298) was a case of accounts entrusted to the defendant to collect and pay over upon demand,

reception of moneys, demand of the amount, and refusal. Justice Harris treats it as a case of services rendered by an agent in a fiduciary capacity. He was acting under a special trust. The principal had confided in the *man* rather than in his ability to pay. "I think the criterion in every such case is, whether the specific moneys received ought in good faith to have been kept and paid over to the employer; or, whether the defendant, upon receiving such moneys, had the right to use them as his own, holding himself accountable to the principal for the debt thus created."

In *Noble vs. Westcott* (4 E. D. Smith, 139), the affidavits stated substantially that the plaintiffs remitted a sum of money to the defendants, with express instructions to use the same in the purchase and shipment of sugar; that it was to be employed in no other way; and that a portion of it had been misappropriated. An arrest was sustained.

Frost vs. McCarger (14 Howard, 131) was the case of a contract by which the defendant received fruit trees from the plaintiff, to deliver to persons in another State, who had agreed to purchase them. The defendant was to receive the money, and, as collected, to remit the same by draft on New York to the plaintiffs. He was held to be an agent in a fiduciary capacity. There was a special trust and confidence reposed in him, and he was liable to be arrested. The plaintiff had alleged embezzlement, and the defendant asserted that he had lost the money. The learned Judge (Marvin) was disinclined to pass upon this question, on contesting affidavits upon these issues.

In *Goodrich vs. Dunbar* (17 Barbour, 644), the defendant was consignee and agent of a ship owned by the plaintiffs, which was sold, and the proceeds received by the defendant. His duties were to take general charge of the ship, pay all expenses relating to her, sell her, pay expenses of sale, and account to the plaintiffs, not for the whole balance of the proceeds less his commissions, but for the balance he might owe on general account.

It was held that the plaintiffs meant to trust the defendant as their debtor, rather than as an agent, and that the case was not within the 179th section.

In *Bassing vs. Thompson* (15 Howard, 9 ; 6 Duer, 696, General Term Superior Court), the defendant was a banker, and was employed by the plaintiffs as such, to receive their deposits, collect their bills, and credit the amount. It was agreed that he might use the moneys, paying the drafts on him when presented, and allowing interest on the balances at five per cent. The agreement was acted under, and, on the 13th of August, 1857, the plaintiffs remitted a draft for \$4,000, payable the 25th of August, to be collected and passed to their credit. The defendant received it on the 15th of August, and collected the amount on the 25th, and used the money. On the 24th he knew he was insolvent, and suspended on the 25th, after collecting the draft.

It was held that the money was not received by the defendant in a fiduciary capacity.

The relation between the parties was that of debtor and creditor, not that of trustee and *cestui que trust*.

It was also held that he had not wrongfully converted the plaintiff's property ; nor was he guilty of a fraud in contracting the debt or incurring the obligation for which the action was brought ; or in disposing of the property, the proceeds of the draft. An order vacating an order of arrest was affirmed.

In *Schudder vs. Shields* (17 Howard, 420, General Term, Sixth District), the plaintiff sent to the defendant, in New York, butter to be sold on commission. Sales were made, the amount received, and the defendant neglected to remit. He received the money with other money received in his business, and passed to an assignee what money he had at the time of such assignment. The Court, on appeal, affirmed an order denying a motion to vacate an arrest. There was a trust reposed and not a credit given. Confidence was reposed in the integrity of the man, rather than in his pecuniary ability.

In *Bull vs. Melliss* (9 Abbott, 58), the firm in which the defendant was a partner had received funds of the plaintiff from his agent, having been previously requested by the plaintiff to remit the same, which they promised to do. They remitted a bill of exchange on a branch of their own house, which was accepted, but not paid. The defendant was held liable to an arrest, by the court at General Term, before Justices Roosevelt, Ingraham, and Pratt, the latter dissenting.

THIRD SUBDIVISION.—The defendant may be arrested—

“In an action to recover the possession of personal property unjustly detained, where the property or any part thereof has been concealed, removed, or disposed of, so that it cannot be found, or taken by the sheriff, *and with the intent that it should not be so found or taken, or with the intent to deprive the plaintiff of the benefit thereof.*”

This provision, in 1848, was as follows :

“In an action to recover the possession of personal property unjustly detained, where the property shall not have been delivered to the plaintiff, or security given therefor as provided in the next chapter” (that of Claim and Delivery).

The section was amended in 1849, and was then in its present form, except the clause above italicized. In 1851 that clause was added, and the section has remained the same to this time.

It is to be noticed that the bail which is given when an arrest is had under this subdivision, is different from that under the other subdivisions.

It must be (by section 187) that which is provided by section 211. That section requires an undertaking, with two or more sureties, for the delivery of the property to the plaintiff, if such delivery is adjudged, and for the payment to him of such money as may, for any cause, be recovered against the defendant.

In *Mulvey vs. Davison* (8 Howard Pr. 111), the action was to recover possession of personal property. The sheriff certified his service of the papers, and demand and refusal, and “that the property has been concealed or disposed of, so that he could not take the same.” On this, and an affidavit of wrongful taking, the defendant had been arrested.

On motion to vacate the order, it appeared that the defendant was a police-clerk ; that the property was taken from a person on a charge of stealing, and delivered to the property-clerk of the police court, and had not since been in the possession of the defendant. The bail was to be given pursuant to section 211. It was held, by Mr. Justice Bosworth, that both the certificate and affidavit were defective, in not stating the intent that the property should not be found, &c. *Again*, that the property was not in the possession or control of the defendant, either at the time

the action was commenced, or when the sheriff demanded it, or since.

Roberts vs. Randall (3 Sandf. Sup. Ct. Rep. 707), and *Remin vs. Nagle* (1 Code Repr. N. S. 219 ; 1 E. D. Smith, 258), are cited. The first was a decision of the Superior Court, and the second of the Common Pleas, both at General Term. They hold, explicitly, that, to entitle the plaintiff to maintain an order of arrest under this subdivision, it must have been true, as a present fact, that the property claimed was *detained* by the defendant at the time the suit was commenced, or at all events when the action was moved by the plaintiffs, or some other assertion of their claim to the property was made. "The whole scope of the chapter indicates that the Legislature meant to apply it to a case of *actual* detention, by the defendant, and not a fictitious or constructive one founded on the mere fact that, by the defendant's act, the plaintiffs had lost the possession."

In *Ward vs. Woodburn* (27 Barbour, 346) the Supreme Court of the First District, at General Term, referring to *Roberts vs. Randall*, say that, upon a review of that question in the Supreme Court, that case has been substantially overruled ; and it has been held that the present remedy for the recovery of personal property is as full, general, and complete as replevin was under the Revised Statutes ; and that the action will lie, although the defendant, before suit, has parted with the property.

The elaborate opinion of Justice Hand, in *Brockway vs. Burnap* (16 Barbour, 309), is to the same effect.

The case in which an order of arrest can be made under this subdivision must be one distinctly for a recovery specifically of the property. If the relief asked is a judgment for a given sum for damages, the order under this clause cannot be supported.

In *Seymour vs. Van Curen* (18 Howard, 94), the complaint was for the wrongfully taking, carrying away and converting a horse to the use of the defendants. The relief demanded was a judgment for \$1,500 damages besides costs. This determined the character of the action ; and it was not one to recover possession of personal property. An order of arrest under this subdivision could not be supported, although one under subdivision 1 might have been. An order of arrest was set aside.

FOURTH SUBDIVISION.—The defendant may be arrested—

(1st) “When the defendant has been guilty of a fraud in contracting the debt, or incurring the obligation for which the action is brought; or (2d) in concealing or disposing of the property, for the taking, detention or conversion of which the action is brought.”

There was no such provision as this in the Code of 1848. It was enacted in that of 1849, and has continued in its present form from that time.

Fraudulent contracting of the debt, &c.—1st. The first clause of this subdivision corresponds with the fourth subdivision of section 4 of the act of 1831, “that the defendant fraudulently contracted the debt, or incurred the obligation, respecting which such suit is brought.”

The rules upon this subject—what will constitute such a fraud in the contracting of the debt—are nice and complicated.

It may be safely stated that mere insolvency at the time, known to and believed in by the party to the contract, is not enough; nor mere concealment of this fact from the vendor. “The proposition that a purchaser upon credit stands in a confidential relation to his creditor, so as to bind him to disclose his situation without any inquiry by the seller, is not sustained by any sufficient authority. The test inquiry in such cases is, ‘Did the party purchase the goods in question with the intention not to pay for them?’” (Hall *vs.* Naylor, 6 Duer Rep. 71.)

The rule thus laid down was substantially affirmed in the same case by the Court of Appeals. Judge Comstock says: “It does not appear that Kerr & Co., in purchasing the goods in question, made any representation of their ability to pay for them. If, however, they concealed the fact of their insolvency with a design of procuring the goods without paying for them, it was a fraud which rendered the sale void. On the trial of such an issue, the *quo animo* of the transaction is the fact to be arrived at. If, however, the purchaser, at the time of a new purchase, is not only insolvent and knows himself to be so, but has performed an open and notorious act of insolvency by breaking up his business and assigning his property, it is his duty to communicate that fact, and the violation of that duty is a fraud.” (Mitchell *vs.* Warden, 20 Barbour, 253.)

But express representations of ability to pay, made at the time, and sufficient to induce, and which did induce the credit, will be evidence of an intended fraud. The representations must be false, and must be known to the party making them to be so.¹

“It is competent to show that the party accused was engaged in other similar frauds, at or about the same time. The transactions must be so connected in point of time, and so similar in their other relations, that the same motive may reasonably be imputed to them all.”²

“Where the question is, whether goods have been procured by a fraudulent suppression of facts material to credit given, it will be competent to prove that in other instances they have been obtained by actual misrepresentations concerning the same facts. The concealment in the one case, and the false representations in the other, are evidence of a fraudulent design, common to both transactions, of procuring goods without the ability or intention to pay for them.”³

In the case of *Crandall vs. Bryan* (5 Abbott, 162), some points of importance were determined; and although the case was before a single judge only (E. D. Smith, Jr.), it seems to me the propositions are either clearly law, or extremely well supported.

Fraudulent representations and deceit, accompanied by damage, constitute a good cause of action in respect to a sale of lands, as much as in respect to personal property. They did so before the Code. (1 Comstock, 308.)

The action would then have been strictly one upon the case. It was not one under the Code, of debt or contract, and the right of arrest could not be sustained upon the first clause of this subdivision or class of actions.

Formerly, in respect to many rights of action, there was an election whether the form of the action should be *assumpsit* or *case*. Where, in cases of fraud, the remedy would have or might have been *assumpsit*, an arrest can now clearly be made; for that is an action where the defendant “has been guilty of fraud in con-

¹ *Freeman vs. Leland*, 2 Abbott Rep. 479; *Wenzer vs. De Baum*, 1 E. D. Smith, 261; *Gaffney vs. Burton*, 12 Howard Pr. Rep. 516.

² Opinion of the Court of Appeals in *Hall vs. Naylor*; *Cary vs. Hotailing*, 1 Hill, 311, and cases.

³ *Ibid.*

tracting the debt," &c. But where the form of the remedy would have been *case* under the old system, whether the defendant can be arrested depends upon the proper construction of the word *obligation*.

That word was equivalent to *legal liability* or *legal duty*. It included all the cases beyond those which would be embraced in the first clause, where the fraud was committed in contracting the debt for which the action was brought; where the action would not rest upon the contract, but would rest upon the legal duty. Wherever fraud and damage give a right of action, the law casts a liability, and creates an obligation.

These principles of the learned judge were applied to a case in which there had been an exchange of lands by deeds, the defendant representing that he had a good title to the lands he conveyed. It appeared that his statements were false and fraudulent, and the action was to recover damages, the value either of the lands given, or those which should have been received.

The case of *Whitcomb vs. Solomon & Booth* (16 Howard, 533) was before the same learned judge. He held that if the representation which induced the credit for the goods (of a certain person being his partner who was of credit) was false in fact, and which he knew at the time to be false, it would not do for the defendant to say that he did not intend to defraud the plaintiffs at the time. They were in fact defrauded. They gave credit to a false statement.

So, in *Scudder vs. Barnes* (16 Howard Rep. 534), it was held that a representation, by the defendant, that he was perfectly good and responsible for all the goods he might purchase, implied that he had sufficient property, beyond all debts and liabilities, to pay for the goods he proposed to purchase. This being followed in a little over a month by a general assignment showing a deficiency of near fifty per cent., and no satisfactory account being given of the change in his position, showing how his representations could have been true, the inference of fraud was clear.

In *Mitchell vs. Warden* (20 Barbour Rep. 253, General Term, 7th District) these propositions were laid down: The law does not, in ordinary cases, impose upon the purchaser of property the duty of disclosing to his seller, at or before the sale, the state of his

pecuniary circumstances, however desperate they may be, and are known by him to be. For a fraudulent misrepresentation, by the purchaser, of important facts in respect to his circumstances, accompanied with damage, the law affords a remedy; the sale may be avoided, and an action to recover damages for the fraud will lie. The rule that the purchaser is not bound to disclose his insolvency is applicable notwithstanding there has been a long course of dealings between the parties, in the course of which credit has been given to the purchaser, and he had punctually performed his engagements,—his insolvency having occurred during these dealings.

In *Morrison vs. Garnet* (7 Abbott, 425), the defendant had been accustomed frequently to purchase from the plaintiffs, for cash, bills of exchange for remittance to Europe in his business. He became insolvent, and procured the plaintiff to sell him bills to a large amount, on credit, concealing his insolvency, though making no direct false representations as to his condition, or the use to which he meant to put the bills. He then sold them in the market. It was held that the purchase was fraudulent, and an arrest allowed.

In *Birchell vs. Strauss* (8 Abbott Rep. 53, General Term, 1st District), it was ruled that a purchase of goods upon credit, on representations of solvency not true in point of fact, but believed to be true, was not enough to warrant an arrest. *Gaffney vs. Burton* (12 Howard, 516) was cited and approved.

Fraudulent contract of debt by partners.—Whether one of several partners can be arrested, in a case in which goods have been obtained upon fraudulent representations by his copartner, has been the subject of contrariety of opinion and decision.

In an anonymous case (6 Abbott Pr. Rep. 319), in the Common Pleas, it was held that one partner could be arrested for the fraud of his associate. But in the subsequent case of *The Hanover Company vs. Sheldon* (9 Abbott, 240), the same learned Judge explained that decision, and held that it proceeded upon the ground of possession, control, and demand of the property in and from all. He decided that, as the action was brought for the price of the goods, affirming the contract, the partner could not be arrested in the absence of proof of his knowledge of the fraud, or that he had in some way ratified the transaction.

So, in *Wetmore vs. Earle* (Supreme Court, Dec., 1858, 9 Abbott 58, note), it was held by Mr. Justice Davies, with the concurrence of Mr. Justice Ingraham, that the partner who was innocent of the false representations by which goods were obtained could not be arrested.

In the case of *Townsend vs. Bogart* and two others (Superior Court, General Term, February, 1860), the subject was much discussed. The defendants had been partners. Goods were obtained from the plaintiffs by misrepresentations and fraudulent practices of the partners Jeffries and Jackson. All were arrested, and Bogart moved, on the plaintiff's affidavit alone, for his own discharge. It did not affirmatively appear that Bogart was a party to, or cognizant of, the fraudulent representations to induce the sale and delivery of the goods, or the disposition subsequently made of them. Neither the contents of the summons or complaint were before the court. The affidavit stated that the action was brought to recover the price of goods sold.

Mr. Justice Moncrief had refused to discharge Bogart from the arrest, holding that enough appeared to warrant the inference that the proceeds of the goods thus obtained by fraud, were used for the benefit of the partnership; and it was not shown that Bogart was not aware of the whole transaction.

Upon appeal, Chief Justice Bosworth held that the firm had received the goods and disposed of them. As they were obtained by fraud, trover, or an action on the case for the deceit and fraud, would lie against all; although Bogart, as matter of fact, was ignorant of it. (*Hawkins vs. Appelby*, 2 Sand. Supr. Ct. Rep. 421 to 429; 1 Metcalf, 560.)

By the rule before the Code, each partner could have been held to bail. (2 R. S. 348, § 8, subd. 3.)

The form of the action, as stated in the affidavit, did not preclude the supposition that the complaint would make out such a case as would justify an arrest under section 179, subd. 1, for wrongfully taking or converting property.

He thought the defendant Bogart could have been held to bail under subd. 4 of section 179, where the defendant had been guilty of a fraud in contracting the debt or incurring the obligation. The fraud of one partner is so far the fraud of all as that an action will lie against all for it; and all are liable for the dam-

ages caused. No just distinction existed between this liability and a liability to be arrested upon the same state of facts. The phrase "when the defendant has been guilty of a fraud," designates and includes all who are to be deemed as contracting the obligation through fraud.

"So long as the law imputes the fraud to him, and for the purpose of the civil remedy of the party defrauded, declares it to be his fraud, I think he is as liable to be arrested and held to bail, as if he had committed it in intent and in fact."

Upon the facts, also, the Chief Justice considered that it would be a great stretch of credulity to believe that Bogart was ignorant of the repeated applications for payment made at the store through a period of six weeks, and did not learn, if he did not know when the goods were bought, that they were procured by fraud.

Mr. Justice Woodruff stated that he was not prepared to hold that, where a plaintiff affirms the contract of sale, and founds his action thereon, and shows the fact of the partnership, and proceeds on the joint liability of the defendants for the price, each of the partners is liable to be held to bail because the purchase was obtained by the fraud of one of them.

The only provision of the Code under which, in such a case, the defendants could be held, was the 4th subdivision of section 179—"when the defendant has been guilty of a fraud in contracting the debt for which the action is brought." This did not mean that every defendant who is liable for the debt would be liable to an arrest, when one only committed the fraud and the others are innocent. The action being in affirmance of the sale, he only who was guilty of the fraud could be arrested.

Mr. Justice Robertson concurred substantially in these views.

Mr. Justice Hoffman was of opinion that the order could be supported under the view taken by the Chief Justice, viz., that, notwithstanding the language of the affidavit, the complaint might be for wrongfully taking and detaining. That, considering the case as governed by the 4th subdivision of the 179th section, he thought that proof of fraud by one partner in obtaining the goods, proof of their going into the possession of the firm, proof of such an agency in the business of the concern as showed or raised a strong presumption of knowledge of the reception of the

goods, and proof of their disposition for the benefit of the firm, made a case sufficient, *prima facie*, to warrant the arrest of a partner not directly charged with an actual share in the fraud. It was enough, at least, to drive the defendant to show affirmatively his own ignorance of it, his disavowal of it when known, and an attempt to redress it, if at all in his power.

The order below was affirmed.

The motion to discharge Bogart was subsequently renewed on affidavits on both sides, and denied upon a strong preponderance of testimony as to his knowledge of the means by which the purchase was made.

In *Curran vs. Allen* (21 Howard's Pr. Rep. 114) this decision of the Superior Court was cited and approved.

FIFTH SUBDIVISION—The defendant may be arrested—

“When the defendant has removed or disposed of his property, or is about to do so, with intent to defraud his creditors.”

The corresponding clause in the statute of 1831 is: “That he has assigned, removed, or disposed of, or is about to dispose of, any of his property with intent to defraud his creditors.” (§ 4, subd. 3.)

The section of the Code as it now stands was adopted in 1849.

The case of *Hathorn vs. Hall* (4 Abbott, 227) contains an exposition of this provision. A motion to vacate an order of arrest was made on the plaintiff's own affidavit. The learned judge¹ put the question thus: “Do the statements furnish satisfactory evidence that the defendant is about to remove his property out of the jurisdiction of the court, or to dispose of it with intent to defraud his creditors?”

“All that the plaintiff states on the subject is derived,” he says, “from declarations made by the defendant in conversation. Are these declarations inconsistent with any other intent than that imputed to the defendant?”

“The defendant refused to pay; said he never intended to pay; that he had property, which he refused to transfer as collat-

¹ Justice Peabody, Special Term, 1st District.

eral to the debt. He spoke about selling his horses and carriages; declined to confess a judgment; said it would take plaintiff twenty days to get it; said he didn't intend to pay, and that plaintiff had no prospect of getting it. All this does not necessarily show, or tend thereby to show the intent which constitutes the gravamen of the charge here."

In *Spies vs. Joel* (1 Duer, 609), on motion to vacate an order of arrest, it appeared that the defendants had made an assignment of all their property for payment of debts, enumerating the creditors, but not providing for any surplus which might remain.

It was shown that the preferred debts largely exceeded the value of the property assigned. It was held that, conceding the assignment to be void under the statute, it was only constructively so; and proof of actual intent, in all cases in which fraud is charged, ought to be required to justify an order of arrest. The omission could raise a presumption only, and this was fully met by the fact of the insufficiency of the property to pay the debts, and that being known to the defendants at the time.

This case is cited and acted upon in *Birchell vs. Strauss* (8 Abbott, 33), where numerous objections were taken to an assignment, and among them that there was no change of possession of the assigned estate.

In *Vredenburg vs. Hendricks* (17 Barbour's Rep. 179), Mr. Justice Davies said: "The plaintiff is to establish his charge by satisfactory evidence in the form of an affidavit. Without such an affidavit the judge obtained no jurisdiction over either the subject-matter or the party. Evidence tending to establish the charge, even though it might be regarded as slight and uncertain, would perhaps be enough to sustain the warrant upon the question of jurisdiction. But there must be some legal evidence calling upon the judgment of the officer as to its sufficiency. Two facts only were relied upon as furnishing this evidence. The first, that the debtor had a legacy of \$600 left him, which he refused to appropriate in payment; and next, that when process was served, he declared that he would not pay one cent of the plaintiff's demand. He was under no legal obligation to apply the legacy, at least before judgment. This refusal did not convict him of an actual or meditated fraud in the disposition of his property. The declaration to the officer was but a refusal to

pay the debt. It may have been indicative of dishonesty, but did not tend to establish the specific charge on which the complainant relied.

The case of *Palmer vs. Kaufman*, before Justice Hoffman, of the Superior Court of New York, January 4, 1854, raised some interesting questions. The defendant was, in November, 1853, a trader in Thomaston, Maine, and owner of a stock of goods in a store there. He secretly withdrew nearly the whole of such stock, keeping up an outward show at the windows and on the shelves, calculated to deceive dealers. He sent some of the goods to New York. He declared an intention of being absent a few days, and locked his doors. Upon being opened by the creditors, the trick was discovered. The debt to the plaintiffs had been contracted in Boston, where they resided. In December, 1853, the defendant was arrested in New York, and a motion to discharge him was denied. It was considered that a citizen of one State was entitled to all the remedies supplied in any other State to its own citizens; and even if a debtor was exempt from imprisonment in the State where the debt was contracted, he might be arrested in another where it was allowed.

But, in *Blason vs. Bruno* (21 Howard's Pr. Rep. 112), it was decided that the offence of disposing of property to defraud creditors, committed in a foreign country, between foreigners, could not authorize the arrest of the party in this State, although he had brought the property with him. There was nothing in the section of the Code referred to which in any manner warranted the supposition that it was intended to apply to acts committed by foreigners in a foreign country.

A different rule exists when the defendant takes the property of another unlawfully in a foreign land and brings it here.

Arrest of female.—"No female shall be arrested in any action, except for a willful injury to person, character, or property."

The Code of 1848 (§ 156) was as follows: "But no female shall be arrested in any action arising on contract, or in any other action, except for a willful injury to person, character, or property."

In 1849 the clause was altered to its present form.

A married woman was, before the Code, in general, exempted

from arrest. If she was arrested singly or jointly with her husband, she was to be discharged on common bail.¹

In an anonymous case (1 Duer, 613), it was held that, in an action of assault and battery against husband and wife, charged to have been committed by the wife alone, the Code had not altered the rule of the common law which exempted a married woman from arrest in all cases; and the Code did not authorize the arrest of the husband for the tort of the wife, or for her contract.

In *Ferguson vs. Clayworth* (2 Dowl. and Lowndes, 165), under the English act, it was ruled that a married woman could not be arrested, unless she had separate property. But if the marriage takes place *pendente lite*, it seems she may be taken. (*Thorpe vs. Argles*, 1 Dowl. and Lowndes, 831.)

In *Tracy vs. Leland* (2 Sand. Sup. C. Rep. 729) a piano had been concealed or removed by a female defendant, so that it could not be found by the sheriff. It was held not to be an injury for which an arrest could be sustained.

If it had been broken or damaged intentionally, it would have been different.

Starrs vs. Kent (2 Code Rep. 30) appears adverse to this decision. It is cited and commented upon by Mr. Justice Mason in *Tracy vs. Leland*.

In the *Northern Railway of France vs. Cashentier* (13 Howard, 222), shares of a railway company, with coupons attached, were held to be property within the Code, and the assisting a party in taking them from the owner, and converting them into money, was a wilful injury to property, for which a female could be arrested.

Shiefe vs. Tuppey (3 Code Reporter, 23) was an action against a female for a breach of a promise to marry, and it was held she could not be arrested.

The provision of the Revised Statutes of 1830 (2 R. S. 428, § 8) was, that no female should be imprisoned on any process in any civil action founded on contract.

It has been held that where a married woman had been sued

¹ Tidd's Practice, Vol. I. 26, and cases; 3 Cowen, 339; 1 Barn. and Ald. 165; Burrill's Practice, Vol. I. p. 90, and cases.

and arrested as a *feme sole*, the court will not as a matter of course discharge her on motion, upon filing common bail, if she obtained the credit pretending she was single, or is sued as acceptor on a bill. (Per Bosworth, Justice, in *Genet vs. Dusenbury*, 2 Duer, 680, citing *Pearson vs. Meadon*, Wm. Bl. Rep. 904; *Partridge vs. Clash*, 5 T. R. 194; *Richardson vs. Carlan*, 2 Mass. 210; *Jones vs. Lewis*, 7 Taunton, 55; *Mores vs. Richardson*, 8 Bar. and Cres. 421, which was after judgment and arrest on a *ca. sa.*; and *Bignon vs. Jones*, 15 Mees. and Welsby, 566, which was of the same character.)

The case in which these authorities were referred to, was one of a judgment by default against a married woman, who had omitted to plead coverture, and had been taken on execution.

It may be questioned whether the principle of these cases can apply, under the peremptory language of the Code, to a case of arrest at the commencement or during the pendency of an action.

Privileges and Exemptions.

Senators, Representatives, &c.—Senators and Representatives in Congress are exempted from arrest during their attendance at the session of their respective houses, and in going to and returning from the same, in all cases, except for treason, felony, and breach of the peace. (Art. I. § 6, Constitution of the United States.)

Members of the Legislature of the State of New-York are privileged from arrest on civil process, during their attendance at the session of the house to which they belong, except upon process issued in any suit for a forfeiture, misdemeanor, or breach of trust in any office, or place of public trust. (1 R. S. 154–6.) This privilege extends for the period of fourteen days previous to any session, and also while going to or returning from such session, provided the time of such going or returning does not exceed fourteen days. (Ibid. § 7.) So during an adjournment, not exceeding fourteen days, and while absent on leave. No officer of either house may be arrested while attending upon the house. (Ibid. § 10.)

In *Corey vs. Russell* (4 Wendell, 204) it was held, that the privilege from arrest did not extend to the case of a member returned home, though fourteen days had not expired.

Military.—No person belonging to the military forces of the State shall be arrested on any civil process while going to, remaining at, or returning from, any place at which he may be required to attend for election of officers or other military duty. (Laws 1858, ch. 129, § 17 ; 3 R. S. 5th ed. 771.)

Witnesses.—Every person duly and in good faith subpoenaed as a witness to attend any court, officer, commissioner, or referee, or summoned to attend any judge, officer, or commissioner, in any case where such attendance may be enforced by attachment or by commitment, shall be exonerated from arrest in any civil suit while going to the place where he shall be required by such subpoena to attend, while remaining at such place, and while returning therefrom. (2 R. S. 402, § 63.)

The court or officer, before whom any person shall in good faith have been subpoenaed to attend as a witness, shall discharge such witness from any arrest made in violation of the last section ; and if such court shall have adjourned before such arrest was made, or before the application for such discharge be made, any judge of such court shall have power to discharge the witness. (Ibid. § 69.)

Every arrest of a witness made contrary to the foregoing provisions shall be absolutely void, and shall be deemed a contempt of the court issuing the subpoena. (Ibid. § 66.)

It was held, in *Stewart vs. Howard* (15 Barbour's Rep. 26), that, as the privilege is personal, it may be waived, and that putting in bail under section 187 was a waiver of the exemption. Had the witness claimed the privilege, the officer before whom he was under examination could have discharged him.

In *Cole vs. McClellan* (4 Hill, 60), it was held that the party must be in attendance strictly as a witness. Where a counselor was in attendance before an examiner as counselor, and had been arrested, he could not claim exemption as a witness, although the next day he was called and examined as a witness.

In *Hardenbrook's case* (8 Abbott's Rep. 416) the party had been regularly subpoenaed and examined before a referee. On a subsequent day he attended, on the request of the attorney, to testify further. He was arrested, not in the referee's office, but while he was attending at the attorney's office, preparatory to his examination. It was held that the statute only exempted a wit-

ness when he was attending under compulsion of a subpoena, not upon a voluntary appearance.

Voluntary foreign witnesses are privileged from arrest.

In *Seaver vs. Robinson* (3 Duer, 622), a resident of another State came voluntarily into this State to be examined as a witness in a cause pending here. While waiting for the cause to be called, it being on the day calendar, he was served with a summons to appear in an action. On motion to set it aside, it was insisted that he was only exempted from an arrest, but not from ordinary process. But the court held that there was no distinction, and that a foreign witness must not be liable even to an ordinary action. *Norris vs. Beach* (2 Johnson's Rep. 294) and *Sandford vs. Chase* (4 Cowen, 381) were cited. Public policy required that the attendance of witnesses to give evidence before a court and jury orally should be unobstructed.

So, in *Walpole vs. Alexander* (3 Douglass, 45), it was held that the protection was due to witnesses coming from abroad to testify as much as to others. Every reason which applies to the protection of a witness at home holds more strongly with regard to a witness who comes from abroad. The privilege protects him in coming, in staying, and in returning, provided he acts *bona fide*, and without delay, which is a question of reasonableness.

Attorneys and counselors.—The Code authorizes, as we have seen, an arrest of an attorney or counselor, under certain circumstances. It is presumed that the former law as to his exemption still exists even in these cases.

By the statute (2 R. S. 290, § 86), all officers of the several courts of record shall be liable to arrest on any process against the body, and may be held to bail, in the same manner as other persons, except during the actual sitting of any court of which they are officers; and when sued with any other person, such officers shall be liable to arrest, and may be held to bail as other persons, during the sitting of the court of which they are officers; but no attorney, or solicitor, or counselor shall be exempt from arrest during the sitting of the court of which he is an officer, unless he shall be employed in some cause pending and then to be heard in such court.

In *Cole vs. McClellan* (4 Hill, 59), it was held that the statute

did not exempt a counselor who might be in attendance before a master, examiner, or judge out of court.

The law of England seems more liberal as to the exemption. The attorney has the privilege, like a witness, *eundo, morando, et redeundo*, from some court or tribunal to which his professional duty calls him. It extends to his going to attend a trial, or a motion, or summons, or an appointment before a master in chancery, or an arbitrator, or commissioners in bankruptcy.¹

An attorney, arrested on his way from his private to his professional residence, in order to procure some papers material to a case in which he was afterwards to go to a court, was discharged; but it was imposed on him, as a condition, that no action should be brought.²

This privilege arises from the supposition that the attorney is engaged in the business of his clients. If, therefore, he is shown to be about to leave the country, when no benefit can be derived from his services to a client, he may be arrested under the 1st and 2d of Victoria, ch. 110.³

In *Humphrey vs. Cumming* (5 Wendell, 90) it was held that if a counselor is arrested while actually attending court for the purpose of making a motion, he will be discharged; but the rights of the party are in no respect prejudiced by the discharge. After the privilege ceases, the same writ may be served, or a new execution be issued.

Pitt vs. Coomes (5 Barn. and Adol. 1078) is an instructive case as to the continuance of an attorney's or counselor's protection. The party attended in court on a motion, and, upon leaving it, went to an office to sort his papers and take some refreshment. There he remained from one to two hours, and then, on his way home, entered a tailor's shop, where he was arrested. He was discharged.

In *Chaffee vs. Jones* (19 Pickering, 260), it was laid down that the exemption of arrest of a party to a suit returning from court is to be allowed with reasonable indulgence; but a devia-

Newton vs. Constable, 2 Queen's Bench, 157; *Lush's Stephens' Practice*, 229, and the cases there cited; *Randall vs. Gurney*, 1 Chitty, 679.

² *Williams vs. Webb*, 2 Dow. N. S. 660; *Pitt vs. Coomes*, 5 Barn. and Adol. 1078.

³ *Thompson vs. Moore*, 1 Dow. N. S. 283; *Flight vs. Cooke*, 1 Dowl. and Lown-des, 714.

tion on his return, to attend the funeral of a son, will be a forfeiture of it.

Ambassadors.—By act of Congress of April 30, 1790 (§§ 25, 26), all writs or process whereby any ambassador or public minister of any foreign prince or state, authorized and received as such by the President of the United States, or any domestic or domestic servant of any such ambassador or other public minister, may be arrested or imprisoned, or his or their goods or chattels may be seized, are void. And any person suing out such process, or prosecuting or executing it, is liable to a fine in the discretion of the court, and imprisonment not exceeding three years.

This act was adopted from the statutes of Queen Anne (7th, ch. 12, § 3). Its phraseology is almost identical.

We have the authority of Lord Mansfield and Lord Ellenborough for saying that the statute was declaratory of the law of nations. The latter adds that it defines to what extent that law is carried.¹ Consuls have been held not to be included within its provisions.

Taylor *vs.* Best (14 Comm. Bench Rep. 487, 25 En. L. & Eq. Rep. 383), is a case of importance and full of learning. It was held that a councilor of a foreign legation, acting as chargé in the absence of his superior, is a public minister of a foreign prince within the statute of Anne. Again, that an ambassador who voluntarily appears in an action brought against him, as a joint defendant, waives his privilege, and cannot afterwards have a stay of proceedings, so long, at least, as his person or property is not interfered with. The privilege, when it attaches, was not lost by the parties engaging in trade. The question was allowed to be an open one, whether an action might not be supported *in invitum* when process is not directed against the person or goods.

In Holbrook *vs.* Henderson (11 Sandf. Sup. Ct. Rep. 619) some points of great importance were decided.

That an ambassador from one foreign state to another, while traveling through the territories of a state to which he is not accredited, in the execution of the duties of his mission, is privileged from arrest on civil process.

The act of Congress relative to the privilege of resident ambassadors was not necessary, nor intended, to confer privileges,

¹ Triquet *vs.* Bath, 3 Burr. 1478; Viveash *vs.* Baker, 3 Maule & Selw. 298.

nor does it limit their extent. Its object was to enforce such privileges, and punish their violation. Those privileges have their origin and support in the law of nations.

And an ambassador from the republic of Texas to the kingdom of France, who was returning from France to Texas, after the discharge of his mission, and was arrested in a civil suit in New York, was discharged.

The 26th section of the act of Congress of 1790 requires that the domestic servants of foreign ministers should be registered in the manner prescribed, to be entitled to the exemption from arrest.

Officers under Police Act.—By the 18th section of the act to establish a Metropolitan Police District, passed April 15, 1857, no person holding office under the act shall be liable to military or jury duty, or to arrest on civil process, or to service of subpoena from civil courts, while actually on duty.

Sheriff not exempt.—In *Hill vs. Lott* and others (10 Howard, 46), it was held that a sheriff was liable to arrest the same as any other person. Such was the rule before the Code, and it had not been altered. *Day vs. Brett* (6 John. Rep. 22), was cited.

Waiver of privilege.—It was decided, in *Stewart vs. Howard* (15 Barbour, Rep. 26), that a witness arrested while in attendance before a commissioner, under a regular *subpoena*, by putting in bail, waived his privilege. The cases collected in *Graham's Prac.*, p. 550, were referred to.

In *Washburn vs. Phelps* (24 Vermont, 506), a party privileged as a witness, while attending court, was arrested, and gave bail. It was held he could still move upon his privilege for a discharge.

In *Pitt vs. Coombs* (4 Nev. & Man. 535), a party privileged from arrest, because of his attending court as a party in an action, deposited money with the sheriff in place of bail. The motion to have it refunded was granted, the delay being accounted for.

Second arrest.—It is well settled as a general rule, that a person who has been once arrested and held to bail, and duly discharged, shall not be again arrested for the same cause of action.¹

¹ *Wheelwright vs. Joseph*, 5 M. & Sel. 93; *Lewis vs. Pottle*, 4 T. R. 570; *Belifante vs. Levy*, 2 Strange, 120; *Enoch vs. Ernst*, 21 Howard's Pr. Rep. 96.

Even more clear is it that he cannot be subjected to an arrest in two actions, in different courts of the same State, for the same cause.¹

But the distinctions are numerous and important :

If the defendant has not been arrested in the first action, but only served with common process, he may be held to bail in a second action for the same cause. (*Bishop vs. Powell*, 6 T. R. 616; *Dawson vs. Cleworth*, cited 1 Chitty, 273, *n.*) The question as to another suit pending, is an independent question.

If the discharge is by reason of a fault of the sheriff's officer, over which the plaintiff could have no control, and was without his knowledge or concurrence, the defendant may be again arrested. (*Housin vs. Barrow*, 6 T. R. 218.)

Where the defendant was let out of custody on his own request, by consent of the plaintiff's wife, to enable him to attend to some business, he could be again arrested on the same affidavit. (*Penford vs. Maxwell*, 1 Chitty's Rep. 79, *n.*)

If the plaintiff is non-prossed, and sues again, it is a subject of great conflict in the English cases, whether the defendant can be arrested a second time. The better opinion seems to be that it should be inferred that the second arrest was vexatious, unless the plaintiff fully repelled that presumption.²

In *Hamilton vs. Pitt*, the defendant was arrested for the amount of two items, and only one was recovered. Upon a second arrest for the other, as to which no evidence had been offered, he was discharged on common bail.

In *Cartwright vs. Keely* (7 Taunton, 194), it was held that, if the judgment in the first action for the plaintiff had been reversed for error, a second arrest in a new action was allowable. But the second arrest being in fact before judgment was entered, though the opinion was intimated, the party was discharged.

In *Richards vs. Stuart* (10 Bingham, 322), the rule was recognized that a second arrest may take place after the discontinuance of an action. It was held that a discontinuance of the writ, with the acceptance of the costs by the defendant's attorney, was equivalent to the discontinuance of the suit itself. See *Imlay vs. Ellesfen*, 3 East, 312.

¹ *Hernandez vs. Carnobelli*, 4 Duer Rep. 642; *Peck vs. Hozier*, 14 John. Rep. 346.

² See the cases, *Petersdorf on Bail*, 136; *Kearney vs. King*, 1 Chitty, 273.

In *Schaab vs. Chase* (16 Howard's Pr. 413), it was held that, although a person could not be arrested more than once by process out of different courts in the same State, for the same cause of action, the rule does not apply where the arrest is absolutely void by reason of the want of authority in the court or officer awarding it.

In *Lovell vs. Martin* (21 Howard's Pr. Rep. 238), where the defendant had moved on the plaintiff's affidavit, and failed, he made a second motion on affidavits on his own part. The application was denied, but without prejudice to a motion for leave to make such a motion.

Detainer.—A party arrested in one action is considered as in custody in all actions in which orders are delivered to the sheriff.¹

But if he has been illegally arrested in the one action, he cannot, it seems, be detained in another without a fresh arrest.²

Action on judgment.—The English rule appears to be that, in an action of debt upon a judgment, whether after verdict or upon a default, the defendant cannot be arrested, if he were holden to bail in the prior action, even although the bail have since become insolvent, or the defendant has surrendered in their discharge. But if he has not been previously holden to bail, he might be arrested. (*Kendal vs. Carey*, 2 Black. 768; *Crutchfield vs. Sewards*, Barnes, 116; 2 Wilson, 93; *Sayers' Rep.* 160; *De la Cour vs. Read*, 2 Hy. Black. 278.)

In *McButt vs. Hirsch* (4 Abbott, 441), it was held that the recovery of a judgment in one of the State courts, upon a debt fraudulently contracted, merged the original cause of action, and the defendant could not be arrested in an action upon the judgment on the ground of such fraud.

A similar decision was made in *Goodrich vs. Dunbar* (17 Barbour, 644), where the alleged cause of arrest was money received in a fiduciary capacity.

In *Wanzer vs. De Baun* (1 E. D. Smith, 261), it was held by the Court of Common Pleas, at General Term, that the recovery of a judgment upon a contract is no bar to a separate action for

¹ *Collins vs. Ewens*, 10 Adol. & Ellis, 570; *Banache vs. Newton*, 1 Queen's Bench, 525.

² *Barratt vs. Price*, 9 Bingh. 566; *Collins vs. Ewens*, *ut supra*.

the deceit originally practiced upon the plaintiff to induce him to enter into it. In an action upon the judgment itself obtained in another State, the defendant might be arrested upon affidavits showing fraud in contracting the original debt, where the fraud was not discovered until after the judgment was recovered. No complaint having been drawn, it did not appear whether the plaintiff intended to rely upon the deceit as his cause of action, or to declare on the judgment.

It deserves notice, that the fact of the judgment being in another State is not noticed in the case or opinion, although it is in the head-note. The reasoning of the learned judge is as applicable to a domestic judgment as to any other.

The case of *The Merchants' Bank of New Haven vs. Dwight* (6 Duer, 659; 13 Howard, 367) established that a defendant who was guilty of a fraud in incurring an obligation, which has been surrendered by the other party to the contract after he had discovered the fraud, and who thereupon took a new obligation, in incurring which the defendant was guilty of no fraud, was not liable to be arrested in an action brought on the latter obligation by reason of his fraud in incurring the first. On general principles, all rights and remedies consequent upon the original transaction should be deemed to have been voluntarily relinquished for the substituted contract and the advantages expected to result from it.

Section 180.

“ Order for arrest, by whom made.

“An order for the arrest of the defendant must be obtained from a judge of the court in which the action is brought, or from a county judge.”

This was originally § 155, and has remained unchanged since 1848.

As to the power of a county judge, there is a similar provision in section 218 as to injunctions. In *Eddy vs. Howlet* (2

Code Rep. 76), the action was in the Supreme Court, and the place of trial was the county of New York. An injunction was granted by the county judge of Kings county. It was held that section 403 defined the meaning of section 218, and that the county judge must be of the county in which the action was triable. The same point was ruled by Justice Harris in *Chubbach vs. Morrison* (6 Howard, 367), in relation to an order to stay proceedings. He relied upon section 401, that orders may be made by a county judge of the county where the action is triable, except to stay proceedings after verdict.

But since these decisions, and in 1859, the 401st section was amended so as to allow orders to be made also by the county judge of the county in which the attorney for the moving party resides.

The case of *Deebles vs. Rogers* (5 Howard, 208) contains a useful history of the statutes relating to the powers of county judges.

A county judge obtains the authority to grant a provisional remedy from the Code only.

In *Scymour vs. Mercer* (13 Howard, 564) an order of arrest was granted by the special surrogate of Cayuga county. There was no vacancy in the office of county judge or of surrogate in that county. Upon an examination of article 6, section 15 of the Constitution, section 1 of chapter 108 of the Session Laws of 1851, and section 1 of chapter 306 of the Laws of 1849, it was held that an order of arrest made by such officer was legal. It was at least a special case within the section of the Constitution.

In *Conklin vs. Dutcher* (1 Code Rep. N. S. 49), it was held that the order of a county judge for an attachment was his order acting as Supreme Court justice at chambers, and his order was to be reviewed in the same manner (§ 403). An order of a judge refusing to set aside an attachment, did not bring up on appeal the question of the sufficiency of the facts on which the original order was granted.

Section 181.

"Affidavit to obtain order. To what actions this chapter applies."

Affidavit to obtain the order.—"The order may be made where it shall appear to the judge, by the affidavit of the plaintiff or of any other person, that a sufficient cause of action exists, and that the case is one of those mentioned in section 179.

"The provisions of this chapter shall apply to all actions included within the provisions of section 179, which shall have been commenced since the 30th day of June, 1848, and in which judgment shall not have been obtained."

The section in the Code of 1848 was as follows :

"(§ 156.) The order may be made when it shall appear to the judge, by the affidavit of the plaintiff or of any other person, that a sufficient cause of action exists (and excepting in the cases mentioned in the second subdivision of section 154); that the defendant is not a resident of the State, or is about to remove therefrom."

The second subdivision of section 154 was in substance the second subdivision of the present section 179.

The first clause of the present section was adopted in 1849, and has remained unchanged since. The second clause was also then enacted.

A cause of action in favor of the plaintiff, against the defendant sought to be arrested, must appear, and that the case falls within section 179.

In cases in which the complaint should show the grounds of arrest—cases where these are identical with the cause of action—the complaint may suffice as an affidavit. And where the complaint and summons have been served, and are laid before the judge, upon an application for an arrest, upon an affidavit which was defective, the complaint was resorted to in order to supply the defect. The order recited that it appeared by affidavit and

complaint that a cause of action existed, &c. The sworn complaint was equivalent to an affidavit.¹

In *Seely vs. Hoyt*, April 13, 1854, it was held at Special Term, Superior Court, with the approval of all the judges, that the analogy of the 220th section respecting injunctions should prevail. The phraseology there was nearly identical with that used in the 181st section, and the weight of authority was in favor of the proposition that a complaint sworn to is equivalent to an affidavit. (See 6 Howard, 210.)

Where the facts upon which the application depends are within the affirmant's own knowledge, the affidavit must be positive. But facts can frequently only be stated on information and belief. In such a case, the affidavit must aver a belief in the truth of the statements, and how and from whom, or from what source, the information was derived, and the reasons preventing the furnishing an affidavit of the person from whom the information was obtained.

Thus, in *Peel vs. Elliott* (16 Howard, 481), the defendant was arrested as being employed by the War Department of the British Government, and as such agent and servant having received moneys and misapplied them. The affidavit was sworn to by the attorney for such Department, in New York. The statements were made on information and belief derived from letters and instructions received from the solicitor of such Department, and upon an exemplification of an inquisition taken under an extent in the English Court of Exchequer. The court held that the objection that the facts were sworn to on information and belief was not available. The means of information were stated, and were sufficient to make out a *prima facie* case.

In *Whitlock vs. Roth* (5 Howard, 143), the arrest was on the ground of the party being guilty of a fraud in contracting the debt, obtaining goods on fraudulent representations, under subdivision 4, representing himself to be a partner of a certain house. The allegations of the debt and the representations were positive, but the allegation of the falsity of the representation was, that the deponent is informed and believes, and expects to prove, that said

¹ *Brady vs. Bissell*, 1 Abbott, 76, cited and adopted in *Turner vs. Thompson*, 2 Abbott, 444.

Roth was not at the time a member of any such firm. The court held that it would not do to lay down as a general rule that an order of arrest could never be granted on information and belief, or without a positive averment of facts by persons conversant with them. But the arrest upon the general allegation that the plaintiff was informed and believed that the representation was false, could not be sustained. The nature and quality, and perhaps sources, of the information must be set forth, so that the court may be able to ascertain whether the party is right in entertaining the belief to which he deposes. So far as the facts may be within the knowledge of the plaintiff, such as the existence of the debt and the manner in which it was contracted, they must be stated positively; but as far as they necessarily rest on information derived from others, they may be so stated, when the sources and nature of the information are particularly set out, and a good reason is given why a positive statement of them cannot be procured.

The rule thus stated is also recognized in *Crandall vs. Bryan* (5 Abbott's Rep. 162). See also *Vanderpool vs. Kissam* (4 Sandf. Sup. Court Rep. 715), and *Mason vs. Bruno* (21 Howard 112).

Justice Smith, in *Crandall vs. Bryan* (*ut supra*), observes: "The statute does not define the proof to be made, except that it be by affidavit; nor does it define or fix the degree or extent of the evidence—how near it must come to legal evidence, such as would be required on the trial of the issues. Something, doubtless, is left to the judgment and discretion of the judge in respect to the particular facts of such case. He must be satisfied judicially."

An affidavit in general terms, that the case is within the 179th section of the Code, is wholly insufficient. An affidavit also in general language, that the defendant has done one of the acts which justify an arrest, as, for example, has removed or disposed of his property, with intent to defraud his creditors, is defective. The facts must be stated which will enable the Judge to conclude judicially that, on the case as presented, the act has been done, and that the intent is deducible.

In *Pindar vs. Black* (4 Howard, 95), Justice Harris said: "It cannot be necessary—indeed, I do not think it would be sufficient—for the party making the affidavit to state that his cause

was one of those mentioned in section 179 of the Code. It is enough that the judge can see, from the facts stated, that it is such a case; and unless facts enough to show this are stated, the affidavit is insufficient."

In *Frost vs. Willard* (9 Barbour, 440), upon an attachment under the statute, the affidavit was, "that the defendant had assigned or secreted his property, with intent to defraud his creditors." It was held that such an affidavit, though in the words of the statute, was insufficient. It had often been so held, and *Ex-parte Robinson* (21 Wendell, 672) was cited.

That case refers to *Smith vs. Luce* (14 Wendell, 237), which is a decisive authority.

In *The People vs. The Recorder of Albany* (6 Hill Rep. 429), Bronson, Justice, said that, "in such cases, where the creditor may be his own witness for the purpose of procuring the warrant, and may choose his own time for arresting the defendant, it is not too much to require that he should in the first instance make out a plain case."

This was in a case under the fourth section of the Non-imprisonment Act.

Where the injury complained of is a tort, all the allegations must be made which are necessary to establish a complete cause of action.

Thus, in *Gadsden vs. McLean* (9 Common Bench Rep. 283); the action was for deceit against a master of a vessel who had signed a bill of lading, the property (oats) turning out to be unsound. The affidavit on which the defendant was held to bail was defective in not stating that the master knew that the oats were unsound when he signed and delivered the bill of lading. On this, a bail-bond given by the defendant on his arrest was ordered to be canceled.

The cause of action in the complaint must conform substantially to the ground of arrest in the affidavits and order. See the cases on this point under section 204.

Where a married woman obtained an order of arrest on a general allegation that the property was her separate property, and the defendant moved on her affidavit, it was held sufficient. (*Lippman vs. Petersburg*, 10 Abbott, 254.)

Section 182.

“Security by plaintiff before order of arrest.”

“Before making the order, the Judge shall require a written undertaking on the part of the plaintiff, with or without sureties, to the effect that, if the defendant recover judgment, the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the arrest, not exceeding the sum specified in the undertaking, which shall be at least one hundred dollars. If the undertaking be executed by the plaintiff without sureties, he shall annex thereto an affidavit that he is a resident and householder, or freeholder, within the State, and worth double the sum specified in the undertaking, over all his debts and liabilities.”

Security by plaintiff.—The Code of 1848 was precisely the same, except that the sum of one hundred dollars was two hundred and fifty dollars. In 1849 the change was made.

By whom signed.—No little difference of opinion has existed as to the sense of the phrase, “on the part of the plaintiff, with or without sureties,” in this section.

In *Richardson vs. Craig* (1 Duer, 666), Mr. Justice Duer held, with the concurrence of three other justices, that although sureties might be dispensed with, it was essential that the plaintiff should execute the undertaking. In cases of married women or infants, the next friend might be looked upon as the plaintiff.

In *Askins vs. Hearn* (3 Abbott, 182), Mr. Justice Emott held, that an undertaking executed by two sureties only, and not by the plaintiff, was sufficient. He examined the subject very fully, and differed from *Richardson vs. Craig*.

In *Bellinger vs. Gardner* (2 Abbott Rep. 441), an undertaking signed by sureties, was held valid by Mr. Justice Davies. He considered that the words denoted substitution; that the thing was to be done by others in behalf of, or on the part of, the plaintiff, and not by himself.

In *Lief vs. Spaursenbergh* (Special Term Superior Court, Sept. 22, 1858), it was held by Chief Justice Bosworth, that such an un-

undertaking by one surety, without the plaintiff, was sufficient. This was on a motion to vacate an order of arrest.

And in *Leffingwell vs. Chave* (Mr. Justice Woodruff, Special Term Superior Court, April, 1860), an injunction undertaking was executed by two persons, neither of whom was the plaintiff. The language in the 222d section is precisely the same in this particular as in the present case.

The judge thought the words, "on the part of the plaintiff," were satisfied by construing them as words of contrast or opposition to the part of his adversary; and it was enough if any other persons peremptorily and unqualifiedly executed the undertaking. They became, as to the defendant, principals; and the present forms of such instruments make all who execute, principals; and in that sense they are undertakings on the part of the plaintiff.

In *Varrault vs. Diflot* (Special Term Superior Court, 1854, Hoffman, Justice), the undertaking was signed by a party who made the affidavit on which the order was obtained, in which he was described as the agent of the plaintiff, a resident abroad, and by one surety. It was, on motion, held sufficient. To the defendant, one was principal, viz., the agent, whose engagement was absolute.

This seems to have been like the case of *Courter vs. McNamara* (9 Howard, 255), where Ferguson executed the undertaking on the part of the plaintiff, making the affidavit that he was a resident and householder within the State, and worth double the sum, &c.

In the *Republic of Mexico vs. Arrangoiz* (5 Duer, 634), the undertaking was signed by the accredited minister, with two sureties.

In *Peel vs. Elliott* (16 Howard, 481), the action was brought by the plaintiff as Secretary of the War Department of Her Britannic Majesty, specially authorized to sue by acts of Parliament, and the undertaking was executed by two persons resident in New York as sureties. This does not appear in the case, as reported, but is so stated by the counsel.

It seems to me that every phrase and portion of the clause in question must receive some effect; and this cannot be, without holding that a principal is implied as a party to the undertaking. That may be the plaintiff, or one in his behalf—in his position—

who would, in an action between the parties to it, be liable for the whole amount, not a contributory share. Sureties are, *ex vi termini*, parties presupposing and added to a principal. Hence, the plaintiff may execute, and, by a subsequent clause, alone, on a certain condition as to his responsibility. An agent or person for him may execute, and alone, if the judge think proper. And in either case the judge may require sureties. But when he does require them, he must have the plaintiff, or some one in his position, to unite.

Section 183. .

“ Order, when made, and its form.

(1) “The order may be made to accompany the summons, or at any time afterwards before judgment. It shall require the sheriff of the county where the defendant may be found, forthwith to arrest him, and hold him to bail in a specified sum, and to return the order) at a time and place therein mentioned, to the plaintiff, or attorney by whom it shall be subscribed or endorsed.”

This section was amended in April, 1862, by adding the following clause: (2) “But said order of arrest shall be of no avail, and shall be vacated or set aside on motion, unless the same is served upon the defendant, as provided by law, before the docketing of any judgment in the action; and the defendant shall have twenty days, after the service of the order of arrest, in which to answer the complaint in the action, and to move to vacate the order of arrest, or to reduce the amount of bail.”

The 158th section of the Code of 1848 was the same as the above (1), except that instead of the words, *to accompany the summons*, the language was, *at the time of commencing the action*.

The change was made in 1849.

The order should conform, in the christian and surnames of the parties, with the summons. By a rule of the courts of Westminster of 1853,¹ where a defendant is described in the

¹ Lush's Practice, 531, 869; a rule governing the Queen's Bench, Common Pleas, and Exchequer.

writ of *capias*, or affidavit to hold to bail, by initials, or by a wrong name, or without a christian name, he shall not be discharged out of custody, if it shall appear to the court that due diligence has been used to obtain knowledge of the proper name.

The 175th section of the Code is very comprehensive. If the plaintiff is ignorant of the name of a defendant, he may be designated, in any pleading or proceeding, by any name; and when his true name shall be discovered, the pleading or proceeding may be amended accordingly.

It would seem that the plaintiff ought to aver his ignorance of the true name. See *Crandall vs. Beach* (7 Howard, 271); *Elliott vs. Hart* (Ibid. 25); *Gardner vs. Clark* (6 Howard, 449).

In *Pindur vs. Black* (4 Howard, 95), Mr. Justice Harris held that it was not necessary that the name of the defendant should be stated. The affidavit stated the plaintiff's ignorance of the name, and that his cause of action was against the man who had, at the time of the injury, command of the sloop *Hornet*. The affidavit was entitled "*In John Pindur vs. John Doe*," and stated that the real defendant in the suit had committed the act.

After judgment the arrest cannot be made; but this means a final judgment, absolute and unconditional. Where the defendant suffered judgment to be taken against him upon failure to answer, and, on motion, was allowed to come in and defend,—the judgment standing as security, but the execution stayed,—an order of arrest granted after the judgment by default was sustained.¹

The order is to accompany the summons, or may be made at any time afterwards before judgment. It is understood, in practice, that a summons must be prepared. In the Superior Court of New York, the judges require its exhibition, or proof of its having been issued.

In *Gould vs. Bryan* (3 Bosworth's Rep. 626), it was decided, in relation to an attachment, that it could issue and be served together with the summons, and the actual commencement of an action was not a prerequisite to this. The chief justice observed that, if the objection be sound, that the court had no jurisdiction to grant process until the summons had been served, and when

¹ *The Union Bank vs. Mott*, 8 Abbott, 150.

the defendant is a non-resident, then an order of arrest would be as unauthorized as an attachment against the property of the defendant. An order of arrest is in the nature of process, and accomplishes the office of an *ac etiam* clause in a *capias ad respondendum*.

The English statute of 1 and 2 Victoria, before mentioned, provided that the order might be made, and the defendant arrested, at any time after the commencement of the action, and before final judgment shall have been obtained therein. (§ 2.) It is held, that though the action must be brought,—that is, the writ be issued,—yet the defendant may be arrested on the *capias* before he has been served with the writ of summons. The affidavit may be sworn to before the writ has been taken out.¹

The order directs an arrest forthwith, and a return of the order at a time and a place therein mentioned, to the plaintiff or his attorney. Of course the arrest may be made at any time before the return-day.

A practice has sometimes prevailed, of another judge of the court altering the time of the return, where the defendant has not been arrested on the first order.

It is to be noticed that the order must be obtained from a judge of the court, and he is to be satisfied by affidavit that a cause of action exists. It may be that the implication (from a change with the initials or signature of the other judge) would arise of his having examined the affidavit; but the safer course seems to be to obtain from him a new or an *alias* order.

Section 184.

“Affidavit and order to be delivered to sheriff, and copy to defendant.”

“The affidavit and order of arrest shall be delivered to the sheriff, who, upon arresting the defendant, shall deliver to him a copy thereof.”

This has remained unchanged since 1848.

¹ Brooke *vs.* Snell, 8 Dowl. Pr. Ca. 370; King *vs.* Craig, 14 Q. Bench, 31. In the former case it was ruled that, although it was not necessary to serve a copy of the summons before the arrest, yet the defendant was entitled to have it served within a reasonable time, or to be discharged.

A similar provision is found in the English statute: "On the execution of the writ the sheriff must deliver a copy thereof to the defendant." It has been held, that a delay of ten hours in delivering it was not a compliance with the statute.¹

An omission or variance in the copy whereby the sense or the description is not altered, will not vitiate the arrest.² But if the copy vary in a material particular, the arrest will be invalid under the English act. (*Smith vs. Pennel*, 2 Dowl. Pr. Cas. 654; *McDonald vs. Mortlock*, 2 Dowl. & Lowndes, 654.)

In *Courter vs. McNamara* (9 Howard, 257), Justice Harris decided that the provision in this section as to a delivery of a copy of the order was merely directory, and the omission to deliver it was an irregularity which might be cured under section 174. (See, to the same effect, *Keeler vs. Betts*, 3 Code. Rep. 183.)

By the 7th rule of the Supreme Court, the sheriff is to file with the clerk the affidavits on which the arrest is made, within ten days after arrest; and this rule, like every other provision enjoining a duty upon the sheriff as to the return of process, may, by rule 8, be enforced by attachment.

Section 185.

"Arrest, how made.

"The sheriff shall execute the order by arresting the defendant, and keeping him in custody until discharged by law; and may call the power of the county to his aid in the execution of the arrest, as in case of process."

This is the same as section 160 of 1848, and has remained without variation since.

If the defendant is already in the sheriff's custody, the delivery of the order to him will operate as a detainer.³

"To constitute a proper arrest, two things appear to be essen-

¹ *Sherman vs. McBright*, 5 Dow Pr. Cases, 572.

² *Lush's Practice*, 532; *Forbes vs. Mason*, 8 Dow. Pr. Cases, 204; *Sutton vs. Burgess*, *ibid.* 489.

³ *Lush's Practice*, 531. So ruled in *McGregor vs. Willett*, Special Term Superior Court, December, 1859, Hoffman, Justice.

tial. 1st. That the party arrested should be put in such a situation as 'to feel that he is under restraint, and is no longer a free agent; and, 2d. That he should be aware that the restraint laid on him is under color of process. If these results are obtained, it matters not what may be the means employed, whether the officer seizes or touches the person, or whether, being advised of the purpose, he submits and follows the officer." (Lush's Pr. 463.)

If the officer enter^d the room in which the defendant is, and locks the door, and tells him he is arrested, this will do, though no manual seizure is made.¹

In *Howden vs. Standish* (6 Common Bench, 504), it was held to be the duty of the sheriff to provide such a force as will enable him to effect the capture in spite of such resistance as he shall have reason to expect. The distinction where there is a rescue after caption is noticed.

In *Bissell vs. Gold* (1 Wendell, 210), Chief Justice Savage said: "We understand the law to be well settled that no manual touching the body or actual force is necessary to constitute an arrest and imprisonment. It is sufficient if the party be within the power of the officer, and submits to the arrest." A similar rule is stated in *Jones vs. Jones*, 13 Iredell's Rep. 448.

In *Butler vs. Washburn* (5 Foster's N. H. Rep. 251), it was held, that the sheriff was the proper judge of the time and manner of removing his prisoner, having regard to the state of his health, and not using his power oppressively.

In *Hubbudd vs. Mack* (17 John. Rep. 127), it appeared that the usual access to the inner rooms of a house was through the back door, which was open. The sheriff used no more force than was necessary to break open the door of the room occupied by the defendant, to serve a *capias ad respondendum*. A motion to set it aside was denied. See also *Williams vs. Spencer*, 5 Johnson's Rep. 352; *Bell vs. Clapp*, 10 *ibid.* 263.

It has long been the rule, that if a rescue is had on mesne process, the sheriff may return this, and will not be liable.²

Jail liberties.—By the statute (2 N. S. 433, § 61, and see 5th ed. Statutes, vol. 3, p. 733), persons taken on a *capias ad responden-*

¹ *Williams vs. Jones*, Cases Temp. Hardwicke, 301.

² See the cases, Tidd's Practice, 60.

dum, or in execution, were, upon certain conditions, entitled to what is called the liberties of the jail—certain defined boundaries, which, in New York, extend to the whole city.

Persons committed on attachment for non-payment of costs, or by virtue of a surrender by bail, were so entitled.

The cases of *The People vs. Benet* (4 Paige, 282), *Patrick vs. Warner* (*ibid.* 397), and *Steere vs. Field* (2 Mason 486), may be referred to as containing the leading rules, and bearing on this subject.

I do not know of a decision upon the point whether such a bond can be taken when the party is arrested under the Code, so as to entitle him to the limits. The mode of relief by bail, as prescribed, or deposit, is explicitly given and regulated. It is the habit, in the sheriff's office in New York, and been sanctioned by counsel, to allow it. If a party is surrendered by his bail, then there does not seem any thing to prevent the statute from applying.

The condition of the bond to the sheriff is, that the person will remain a true and faithful prisoner, and shall not, at any time or in any manner, escape or go without the limits and boundaries of the liberties established for the jail of such county, until discharged by due course of law.

It is presumed that, in such a case, the sheriff becomes liable under section 201, as bail. The bail contemplated by the Code has not been given. He looks to the bond for his own security.

In *Sartos vs. Merceques* (9 Howard, 188), the sheriff, having re-arrested a defendant upon the failure of his bail to justify, a motion was made for a discharge, or that the sheriff be ordered to take bail for the liberties. As bail, under the 201st section of the Code, the sheriff could arrest and surrender the defendant without process. As to the other question the court say: "The other question is, whether the defendant is entitled to the liberties of the jail. Whether he is so or not cannot be of much moment on this motion, because it is not within the province of the court to order the sheriff to take bail for the jail liberties. If he unjustly refuses to take such bail, he is responsible to the injured party. The court cannot pass upon the sufficiency of the bail for the limits, nor in any way order the sheriff to accept the bond of any sureties for such a purpose."

Section 186.

“Defendant to be discharged on bail or deposit.”

“The defendant, at any time before execution, shall be discharged from the arrest, either upon giving bail or upon depositing the amount mentioned in the order of arrest, as provided in this chapter.”

This section has remained unchanged since the first enactment of 1848.

It was anciently considered that bail could not be put in before the return day of the writ, or before the arrest had taken place, without the plaintiff's consent ; but this position has been since repudiated, and it seems now to be permanently settled, that there is no objection against the bail being put in before the return of the process. (Petersdorf on Bail, 284, Law Library, Vol. X. p. 158.)

“When the defendant is in custody, bail may be put in at any time, even after verdict or final judgment, provided he has not been charged in execution.” (Ibid.; Burrill's Practice, Vol. I. p. 109, and cases.)

The bail under this section of the Code is a substitute for bail to the sheriff, and special bail of the former practice.¹ The practice respecting both becomes in several particulars applicable. It is noticed under other sections.

The 197th section provides for the deposit in lieu of bail ; as to which, see *post*.

The discharge may be had at any time before execution. There is nothing, that I am aware, defining which execution is meant. The phrase is general, and probably is to be considered as the execution against property under section 287.

¹ Stewart *vs.* Howard, 15 Barbour, 26. *In re* Taylor, 7 Howard, 212.

Section 187.

“Bail, how given.”

“The defendant may give bail by causing a written undertaking to be executed by two or more sufficient bail, stating their places of residence and occupations; to the effect that the defendant shall, at all times, render himself amenable to the process of the court during the pendency of the action, and to such as may be issued to enforce the judgment therein; *or*, if he be arrested for the cause mentioned in the third subdivision of section 179, an undertaking to the same effect as that provided by section 211.”

The provision in 1848 was the same as the preceding, down to the clause commencing with the word *or*, italicized. The rest of the section was added in 1849.

The form of the undertaking in all cases, except that by analogy to section 211, is as follows:

“(Title.) WHEREAS the above-named defendant, A. B., has been arrested in the foregoing action by the sheriff of _____ at the suit of _____

“Now, THEREFORE, WE, C. D., of, &c., and E. F., of, &c. (places of residence and occupation), do hereby, in pursuance of the statute in such case made and provided, undertake that C. D., the defendant above named, shall at all times render himself amenable to the process of this court, during the pendency of this action, and to such as may be issued to enforce the judgment therein.”

This form, which is in ordinary use, does not designate to whom the undertaking is given, and it seems to be warranted by the language of the Code. The rule in England, under the statute of 23 Henry VI., ch. 9, § 1, was express, that the security must be to the sheriff, in the form of a bond. No other undertaking, in any other form, would avail. Yet, if the plaintiff interfered, and directed the sheriff to discharge the party upon getting security,

he might take it in any form he pleased, and it would be good in his hands.¹

But if the defendant is arrested under the third subdivision of section 179, the form is very different. Section 211 is to regulate the form and effect of the undertaking. That provides that the party give to the *sheriff* a written undertaking, executed by two or more sufficient sureties, to the effect that they are bound in double the value of the property, as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, if such delivery be adjudged, and for the payment to him of such sum as may, for any cause, be recovered against the defendant.

It has been held under this section, that an undertaking is not invalid when it is taken in the name of the plaintiff in the action. (*Slack vs. Heath*, 4 E. D. Smith, 95.)

By the Revised Statutes the bond was to be executed to the officer making the arrest, with the addition of his name of office. (2 R. S. 348, § 12.)

See "Qualifications of Bail," *post*, section 194.

Section 188.

"Surrender of defendant.

"At any time before a failure to comply with the undertaking, the bail may surrender the defendant in their exoneration, or he may surrender himself to the sheriff of the county where he was arrested, in the following manner :

"1. A certified copy of the undertaking of the bail shall be delivered to the sheriff, who shall detain the defendant in his custody thereon, as upon an order of arrest, and shall, by a certificate in writing, acknowledge the surrender ;

"2. Upon production of a copy of the undertaking and sheriff's certificate, a judge of the court, or county judge, may, upon notice to the plaintiff of eight days, with a copy of the cer-

¹ *Lewis vs. Knight*, 8 Bingham, 271 ; *Fuller vs. Prest*, 7 T. R. 109 ; *Decker vs. Judson*, 16 N. Y. Rep. 440.

tificate, order that the bail be exonerated; and, on filing the order and the papers used on said application, they shall be exonerated accordingly. But this section shall not apply to an arrest for cause mentioned in subdivision 3 of section 179, *so as to discharge the bail from an undertaking given to the effect provided by section 211.*”

Section 166 of 1848 was in several points different from, and omitted several of the provisions of, the present section.

In 1849 it was amended so as to read as it does now, except the words italicized. In 1851 these words were added.

By the English practice, the principal might be rendered by the bail, or voluntarily render himself, at any time pending the suit, or even after judgment, provided the render was completed before certain proceedings had been had against the bail. (Petersdorf, p. 399.)

The rule in our courts, before the Revised Statutes of 1830, may be found in the cases of *Stewart vs. Paton*, 1 Hall's Rep. 38. *Ex parte Badgley*, 7 Cowen, 472; *Thomas vs. Bulkley*, 5 Cowen, 25; *Brown vs. Smith*, 9 John Rep. 84. The bail were strictly fixed by the return of the *ca. sa.*, and had eight days as matter of grace only, after the return of the *ca. sa.* against the debtor.

The statute of 1830 (2 R. S. 380) [§§ 21, 22, &c.] regulated the course of proceeding upon a surrender by bail. The period during which the right to surrender existed was not expressly defined. The only clauses which bear upon it are that in the 22d section and in the 28th, appearing to imply a surrender pending the action and before judgment. But the 31st section probably regulated this matter.

The provision of the Code in this section is, that the surrender shall be before a failure to comply with the undertaking. The undertaking under section 187 is, that the defendant shall render himself amenable to the process of the court during the pendency of the action, and to such as may be issued to enforce the judgment. In this connection the 189th section should be referred to, directing that the bail may, for the purpose of surrendering, arrest the defendant at any time before they are finally charged.

The 191st section provides that the surrender may be made within twenty days after the commencement of the action against

the bail, or within such further time as may be granted by the court.

Section 191 would seem thus definitely to fix the time for a surrender. See the cases under that section, *post*.

The first subdivision of the present section presupposes an arrest by the bail, and delivery of the body to the sheriff. By the 189th section the bail are empowered to make such arrest, or to depute any other person to do it. The delivery of a copy of the undertaking to the sheriff authorizes him to detain the party.

The proceeding under subdivision 2 is similar to that under the Revised Statutes. (2 R. S. 380, § 22.)

On the application for an exoneration, the bail cannot set up that the principal was not originally liable to an arrest.¹ Nor can he, after the time for a surrender has expired, be exonerated on the ground that the defendant was a resident and not liable to an arrest.²

Section 189.

"Surrender of defendant.

"For the purpose of surrendering the defendant, the bail, at any time or place before they are finally charged, may themselves arrest him, or by a written authority, endorsed on a certified copy of the undertaking, may empower any person of suitable age and discretion to do so."

Section 164 of 1848 was the same.

In England, bail to the sheriff had no right to take the principal into custody, although it was otherwise with respect to bail above.³

The principal is considered to be in the actual or potential custody of the bail, who are, in contemplation of law, his gaolers, and may seize and render him in their discharge. Their power, under the English rules, was very large.⁴

¹ *White vs. Blake*, 22 Wendell, 612.

² *Stever vs. Somberger*, 19 Wendell, 121.

³ *Rex vs. Hughes*, 3 Carr & Payne, 373.

⁴ *Petersdorf on Bail*, 405.

Under the law of 1813 (1 R. S. Vol. I. p. 323), the bail or manucaptor might surrender the defendant before a judge of the Common Pleas of the county, and the judge was to endorse a committitur on the bail piece.

Under the Revised Statutes, an order of an officer for a commitment, on the application of bail to surrender, was necessary. And this was directed to the sheriff. (2 R. S. 38.) [§ 22.] The execution of the process was doubtless regulated by the rules governing other process.

But as the Code has restored the former rule, of allowing the bail themselves to make the arrest, it may be that all the authority vested in bail by the English and our own law, before the act of 1830, will be applicable.

It has been held that bail may justify breaking and entering a house (the outer door being open) in which the principal resides, in order to prosecute a search for him; and there is no difference between a house of which he is solely possessed and a house in which he resides by consent of another.¹

It is said that a party or a witness, even when in attendance upon court, may be taken and arrested by bail with a view to a surrender.² Yet the plaintiff cannot have a party or witness arrested, *eundo, morando aut redeundo*.³

The bail may use all needful force to compel the party to accompany them, and may require the assistance of others.⁴ They may also authorize his detention by any other person.⁵

This power the section of the Code now considered expressly confers.

In the State *vs. Mahon* (3 Harrington's Rep. 563), it was held that bail (special) might arrest the principal anywhere; they might depute others to do it; but the arrest must be made by such persons, or those assisting him. The arrest should be without violence, unless there is a resistance.

It appears to be conceded, by the decisions in several of the

¹ *Sheers vs. Brooks*, 2 Wm. Bl. 120; *Lee vs. Gansel*, Cowper's Reports, 1.

² *Horn vs. Swinford*, 1 D. & R. N. Pr. Cases, 50; 4 Yeates, 123; 8 Pickering, 138; 7 John. Rep. 145; 4 Conn. 170.

³ See the cases. Petersdorf, p. 86, and *ante*, § 179.

⁴ *Pyewell vs. Stowe*, 3 Taunton, 426; 8 Pickering, 138.

⁵ *Ibid.*, and *Nicholls vs. Ingersoll*, 7 John. Rep. 144.

States, that bail in one State may arrest their principal in another.¹

In *Lockwood vs. Mersereau* (6 Abbott Rep. 210), it was held by Hoffman, Justice of the Superior Court, that an arrest by the sheriff from whom the debtor had escaped, made in the State of Illinois, was valid. What the foreign State might do upon habeas corpus, was a different question. *Nicholls vs. Ingersoll* (7 John. Rep. 144) was relied upon.

Section 190.

"Bail, how proceeded against."

"In case of failure to comply with the undertaking, the bail may be proceeded against by action only."

This has been unchanged since 1848. Section 165.

In England, the party had his election to proceed by *scire facias* on the judgment, or action of debt on the recognizance.² The common law procedure act of 1852 regulates the former. Both bail may be called upon, in the same writ, to show cause why execution should not issue against them; or, as their liability is several, there may be a *scire facias* against each.³ On default of appearance, an execution issues.

The practice in our own State was similar; the 35th section of 2 R. S. of 1830, p. 383, recognized the proceeding by *scire facias*. See *ibid.* 580, § 23.

The Code has, however, no doubt, superseded this practice. And the form of the pleadings, and course of proceeding, must now be regulated by its provisions.

In *Bowdoin vs. Coleman* (6 Duer, 182), which was an action upon an undertaking given in a suit for the recovery of personal property under the 209th section of the Code, the complaint was

¹ *Nicholls vs. Ingersoll*, 7 John. Rep. 144; *Wheeler vs. Wheeler*, 7 Mass. p. 169; *Commonwealth vs. Bricgett*, 8 Pick. 138; *Harp vs. Osgood*, 2 Hill's N. Y. Rep. 216; *Respublica vs. Jailer*, 2 Yeates, 263; *Ruggles vs. Corey*, 3 Conn. 421; *Johnson vs. Tompkins*, 1 Bald. 578.

² *Petersdorf on Bail*, p. 362.

³ *Lush's Pract.* 570.

objected to for want of various averments insisted upon as material. They were examined and passed upon, according to the rules of the Code.

So, in *Slack vs. Heath* (4 E. D. Smith, 95), the form of a complaint in a similar action, which was held good by the court, may be found. Mr. Justice Woodruff dissented upon one point. The conformity to the Code, as illustrated by former rules of pleading, was the question.

The defendants in such an action cannot question the liability of their principal to the arrest. The undertaking imports such liability, which they may not controvert.

In *Gregory vs. Levy & Sedgwick* (12 Barbour, 610), the action was upon an undertaking given upon an arrest. The complaint set forth the commencement of the original action against Levy, his arrest under an order granted for that purpose, the execution of the undertaking, the substance of which was recited, the recovery of a judgment, issue of an execution against property and then against the person, and its return not found. Judgment was then demanded for the amount recovered, interest, and costs.

The answer set up strong grounds tending to show the illegality and impropriety of the order of arrest. On demurrer, it was held, that the Code had in no way affected the liability of bail for a breach of the undertaking. They could not before, and could not now, take the ground of illegality of the order of arrest, or that no *ca. sa.* could issue on the judgment.

For the different defences which might have been pleaded in an action under the former system, see Burrill's Prac., vol. 1, p. 233; Petersdorf on Bail, 284.

Upon the question as to a variance in the frame of the action from that when the bail was given, see *Taylor vs. Wilkinson* (3 Adol. & Ellis), and the cases stated under section 204, *post*.

An agreement between the plaintiff and defendant to defraud the bail by making no defence, is a good defence to the bail in an action on the recognizance. (*Mott vs. Hagen*, 1 Williams' Vermont Rep. 208.)

It is no defence for the bail that the sheriff could have arrested the defendant on a *ca. sa.* in the original snit, unless fraud or collusion is averred. Thus, in *Bradley vs. Bishop* (7 Wendell, 352), on demurrer to a plea, it was held insufficient to aver gross

misconduct on the part of the sheriff, without averring that it was caused by the plaintiffs or their attorney. The action was upon the recognizance of bail.

Special bail may insist, by way of plea in bar, that, before the breach of the condition, an agreement was entered into by the plaintiff that the defendant in the original action might depart the State, and that no proceedings should be had until his return. (*Clark vs. Niblo*, 6 Wendell, 236.)

Section 191.

“Bail, how exonerated.”

“The bail may be exonerated either by the death of the defendant, or his imprisonment in a State prison, or by his legal discharge from the obligation to render himself amenable to the process, or by his surrender to the sheriff of the county where he was arrested, in execution thereof, within twenty days after the commencement of the action against the bail, or within such further time as may be granted by the court.”

This section is the same now as it was enacted in 1848, except the clause, “or his imprisonment in a State prison,” which was adopted in 1849.

Death of principal.—The death of the principal is a ground for the discharge of the bail. The question is, at what time, or on what event, will such death give an absolute right to the bail to be exonerated, and when will the right terminate?

In England, the death, at any stage of a suit before the return of the *capias ad satisfaciendum* against the principal, gave the right. But the court refused to relieve the bail, where the death took place after the return-day of the *ca. sa.*, though it was not actually returned.¹

In *Olcott vs. Lilly* (4 John. Rep. 407), on motion to enter an *exoneratur*, the court said there was no case in which the death of the principal, after the return and filing of the *ca. sa.*, has been

¹ 1 Taney *vs. Berry*, 2 Ld. Ray. 1452; 2 Strange, 717; *Glyer vs. Yates*, 1 Strange, 517; *Rowlinson vs. Gunsten*, 6 T. R. 284.

allowed as a ground of relief. All the cases agree that after the bail is fixed *de jure*, they take the risk of the death of the principal. The time which is allowed the bail *ex gratia* is at their peril.

By the Revised Statutes of 1830 (Vol. II., p. 383, § 34), when the defendant in a suit shall die after the return of the execution against his body, and before the expiration of eight days from the return of the process served on his bail, the court shall relieve such bail on the same terms as if they had surrendered their principal at the time of his death.

In *Davidson vs. Taylor* (12 Wheaton, 604), the English rule was recognized as prevailing in Maryland, that in the case of the death of the principal, bail is fixed by the return of the *ca. sa.* Courts had allowed a surrender within a limited time after the return of the *scire facias* against them; but this rule had never been applied to cases where the principal dies before the return of the *scire facias*. Death after the return of the *ca. sa.* cannot be pleaded.

In *White vs. Blake* (22 Wendell, 612), the rule was recognized, that if the principal had died after the return of the *ca. sa.*, the bail could not be relieved.

In *Merritt vs. Thompson* (1 Hilton, 550), in the Court of Common Pleas, at General Term, the rule that the death of the principal was ground of a discharge was acted upon; but there is nothing bearing upon the question of the time for the surrender.

Sickness of principal.—Bail was allowed to surrender their principal, and obtain an exoneratur, after the eight days allowed *ex gratia* for surrender, where the principal could not be surrendered within that time by reason of sickness. No order to stay proceedings, or rule to extend the time, was necessary, the bail not knowing of the sickness within the time. (*Thomas vs. Bulkeley*, 5 Cowen, 25.) This appears to have settled the practice contrary to some English cases.

Imprisonment in a State prison.—By the rules of our courts, before the Code, a confinement for life in the State prison entitled the bail to a discharge, but not imprisonment on a charge of felony, or to the penitentiary for a short period.

Thus, in *Cathcart vs. Cannon* (1 John. Cases, 28), an exoneratur was refused where the party was confined in prison on a charge

of felony, but granted after his imprisonment for life in the State prison, upon a conviction.

So, in *Loffin vs. Fowler* (18 John. Rep. 335), on a motion to enter an exoneratur on a bail piece, it appeared that the defendant had been indicted and convicted of passing counterfeit money in Vermont, and had been sentenced to the State prison of that State for thirteen years. The court said, the defendant had been taken out of the power of his bail by the judgment of the law. The motion was granted.

In the *Phoenix Fire Insurance Comp. vs. Mowatt* (6 Cowen, 599), it was decided that special bail would not be discharged where the principal had been imprisoned in the penitentiary for a period of two years only.

In England, upon a conviction of felony and sentence of transportation, the bail will be discharged, and the course is by motion.¹

The course seems to have been to bring up the prisoner on a *habeas corpus*, and to order an exoneratur upon his being given into the custody of the sheriff.²

Such appears also to be the course in England.³

It is presumed that this would be unnecessary under the Code; that a motion, upon full proof of the facts and notice, would suffice.

Custody upon process.—If the defendant is in custody upon other process, a writ of *habeas corpus cum causa* was the former English practice, which issued of course in cases of a detainer on civil process.⁴

Legal discharge from the obligation.—If the defendant obtained his certificate of discharge in bankruptcy before the bail became fixed, the latter would be discharged; and a motion for exoneratur was the proper course in England.⁵ The same rule applies to a discharge under the Insolvent Debtor Act. In such a case the proceeding is summary, without the necessity of a render, and the

¹ *Wood vs. Mitchell*, 6 T. R. 247; *Fowler vs. Dunn*, 4 Burrows, 2034.

² *Bignall vs. Forest*, 2 John. Rep., 481; *Bigelow vs. Johnson*, 16 Mass. Rep. 218.

³ *Lush's Stephens' Practice*.

⁴ *Petersdorf on Bail*, 407.

⁵ *Aylett vs. Harford*, 2 Hy. Black. 208; *Petersdorf on Bail*, 390, 392; *Lush's Pr.* 572; *Jones vs. Ellis*, 1 Adol. & Ellis, 382.

application may be made during the period that the bail have the power of rendering.¹

In *Seaman vs. Drake* (1 Caine's Rep. N. Y. 9), the principal was discharged under an insolvent law, and, on motion, an exoneratur was ordered.

In *Franklin vs. Thurber* (1 Cowen's Rep. 427), the Court said—The rule that, where a defendant is discharged under an insolvent law, we will discharge the bail on motion, is grounded on the idea that an actual surrender would be an idle ceremony, because the principal must be immediately liberated.

In the same case it was held that, where the plaintiff had brought *scire facias* on the judgment, to test the validity of the discharge, and the defendant had made default, and then a *fi. fa.* and a *ca. sa.* had issued, and the last returned *non est*, the bail could not be exonerated, because the principal could not be discharged.

Where the discharge had been obtained at such a stage of the suit as enabled the debtor to plead it, and he omitted to do so, but allowed judgment to be entered, he and the bail were concluded.² The latter must resort to a surrender, if that remains open to him.

The discharge cannot, on such an application, be questioned for irregularity or fraud.³

This appears to be different from the rule in England. The court will not exonerate, upon the defendant's obtaining a certificate of bankruptcy, without giving the plaintiff an opportunity of trying, by an issue, whether the certificate was fairly obtained.⁴

Foreign discharge.—The effect of a foreign discharge from debts has been considered in several cases, on motions to discharge on common bail.

In *Whittingham vs. De la Rieux* (2 Chitty, 53), and *Earlier vs. Languish* (ibid. 55), it was held that, where the question was how far a *cessio bonorum* in another place affected the debt, it must be raised by plea, and could not be set up on a motion to dis-

¹ *White vs. Blake*, 21 Wendell, 612.

² *Campbell vs. Palmer*, 6 Cowen, 596; *Post vs. Riley*, 18 John. Rep. 54.

³ *Cunningham vs. Brown*, 5 Cowen, 289; *Trumbull vs. Healy*, 21 Wendell, 670.

⁴ *Woolcott vs. Leicester*, 6 Taunton, 75; *Stacey vs. Frederici*, 2 Bos. & Pull. 310; *Willison vs. Smith*, 3 Douglass, 96.

charge the party from imprisonment on filing common bail. See, also, *Phillipotts vs. Reed*, 3 J. B. Moore, 244; *Bamfield vs. Anderson*, 5 *ibid.* 331.

In *Bretillot vs. Sandors* (4 Scott's Rep. 201), the defendant had been a trader in France, where he became bankrupt. Proceedings similar to those under the English law took place; a dividend of property was made, and the plaintiff took his share. Both the parties coming to England, the defendant was arrested for the balance of the debt. On a motion to discharge him, the court said—The difficulty was, it would be trying a very grave question upon affidavits. What was urged might, if true, be a good ground of defence; but the court could not interfere in that summary way.

Sicard vs. Whale (11 John. Rep. 194), in our court is to the same effect.

Perhaps, in a case perfectly free from doubt as to the legal operation of the discharge, a motion would not always be inadmissible. A few leading cases upon foreign discharges may be referred to: *Phillips vs. Allan*, 8 Barn. & Cress. 477; *Cook vs. Moffat*, 8 Howard's N. S. Rep. 295; *Donelly vs. Corbet*, 3 Selden's Rep. 500; *Peck vs. Hibbard*, 26 Vermont, 698.

Extension of time to surrender.—In *Gilbert vs. Bulkley & Chaffin* (1 Duer, 668), the motion for exoneration was made after twenty days from the commencement of the action against the bail, and no order for further time had been obtained. The chief justice, Oakley (upon consultation), held, that whatever might be the construction of section 191, if it stood alone, yet that the general words of section 174 certainly gave the court the discretionary power to allow this act to be done after the time limited by the Code.

There does not seem anything in the 191st section itself prescribing that the surrender must be within the twenty days. During that time, it is matter of right. After that time it may (within the fair construction of the language) be matter of favor.

By the English rule the time will not in general be enlarged for the bail to surrender. But indulgence has been granted in cases where, from the character of the facts, injustice would have ensued from the refusal of the application.¹

¹ Petersdorf on Bail, p. 403, and cases; *Harris vs. Glors*, 2 Chitty Rep. 101.

In *Baker vs. Curtis* (Supreme Court Chambers, March 1860, Allen, J.), it was held that though after the twenty days had expired from the commencement of the action, the bail had become fixed, yet the court could within that time enlarge the time for a surrender; and probably after that time it might be permitted, on a clear case being made which would have entitled him to an enlargement if applied for within the time.

The affidavit of the bail in that case was unsatisfactory. It did not give a single date, nor state what means he had taken at any time to ascertain where the principal was and to effect his surrender. He stated, generally, efforts to do so. He should have stated what he did, and when he did it. He actually showed laches, and a voluntary sufferance of the defendant to go out of the State. The motion to exonerate the bail was denied.¹

Section 192.

“Delivery of undertaking to plaintiff, and its acceptance or rejection by him.”

“Within the time limited for that purpose, the sheriff shall deliver the order of arrest to the plaintiff or attorney by whom it is subscribed, with his return endorsed, and a certified copy of the undertaking of the bail. The plaintiff, within ten days thereafter, may serve upon the sheriff a notice that he does not accept the bail, or he shall be deemed to have accepted it, and the sheriff shall be exonerated from liability.”

The 167th section of 1848 was substantially the same as the present enactment. It was revised in 1849, and has since remained the same.

Until the order and copy of the undertaking is delivered, the plaintiff, I apprehend, is not bound to take notice that bail has been given.²

Waiver of exception.—After notice of non-acceptance of the bail, the plaintiff may waive his objection, provided the waiver be made before the time for justifying expires.

¹ Reported, 10 Abbott, 279.

² *Butterfield vs. Cooper*, 6 Cowen, 608.

In *The People vs. The N. Y. Superior Court* (20 Wendell, 607), it was declared to be well settled that the bail cease and are to be deemed out of court, if they do not justify within the time allowed, after exception; and after this, it may well be that the plaintiff cannot waive the exception, and that even the attorneys cannot do so without the consent of the bail (9 Wendell, 478): their contract is at an end.

But if a waiver takes place before the time of justification has expired, I am unable to discover any reason against giving it effect, either in respect to the bail themselves or their principal. Notice of exception must be in writing, and it may well be that a parol waiver would be insufficient.

The notice must be in writing, and should be entitled in the cause. It should be a perfect instrument in itself.¹

Section 193.

"Notice of justification. New bail.

"On the receipt of such notice, the sheriff or defendant may, within ten days thereafter, give to the plaintiff or attorney by whom the order of arrest is subscribed, notice of the justification of the same or other bail (specifying the places of residence and occupation of the latter) before a judge of the court or county judge, at a specified time and place; the time to be not less than five nor more than ten days thereafter. In case other bail be given, there shall be a new undertaking in the form prescribed in section 187."

Section 168 of 1848 was different, in stating that "on the receipt of *the undertaking* and notice;" in making the justification to be "before a judge;" omitting the words "of the court or county judge;" and in referring to section 162 instead of section 187.

In 1849, the change was made that the justification must be before "a judge of the court or county judge, or justice of the peace." In 1851 it was amended as it now stands.

¹ *Cohn vs. Davis*, 1 Hy. Black. 80; *Rex vs. The Sheriff of Middlesex*, 1 Chitty Rep. 742.

A notice of justification is, as between the parties, a waiver of any irregularity in the notice of an exception.¹

The description and places of residence must be stated with reasonable precision. The addition of the trade or occupation should be made. Any misdescription by which the plaintiff is misled, or does not get a reasonable clue to the party to enable him to make inquiry, makes the notice defective.²

The residence must not be stated in too general terms; at "Liverpool," "Nottingham," &c., or any other place of magnitude, is an insufficient notice. The principle appears to be, that where the bail live in or near any smaller *lieu connus*, the naming of the larger district will not do.³

Where any intention to mislead is repelled by the affidavits, time to add to and correct the notice, and to justify, will be allowed.⁴

Bail excepted to no longer bail.—In several cases it has been laid down that bail who are excepted to, and do not justify, cease to be bail, and are entitled to an exoneratur.⁵ These cases are subject to the distinction taken in *The People vs. The New York Superior Court* (20 Wendell, 607), before stated (*ante*, p. 71). In that case they were all reviewed.

Motions for exoneratur were made in all of them; but it would seem as if the exemption took effect from the exception, or from the expiration of the time to justify, if there was no waiver of the exception before that period, and that the bail was entitled to it at any time, upon payment of costs. See *Humphrey vs. Leite*, Burrows, 2107, and cases cited; *Toulk vs. Burke*, 1 Bl. Rep. 462; *Bramwell vs. Farmer*, 1 Taunton, 429; *Gould vs. Holstrom*, 7 East, 580; *Taylor vs. Shapland*, 3 M. and S. 328; *Adnam vs. Wilks*, 6 Barn. and Cress. 237.

New bail.—If new bail is given, instead of the former justify-

¹ *Cohn vs. Davis*, 1 Hy. Bl. 80.

² *Colman vs. Roberts*, 1 Chitty's Rep. 88; ——— *vs. Costar*, 5 Taunton, 554; *Brown's Bail*, 5 Dow. Pr. Ca. 220.

³ *Jackson's Bail*, 1 Chitty Rep. 492 and *n.*; *Anon.*, 3 Moore, 318; *Taylor's Bail*, 1 Chitty, 503; *Petersdorf on Bail*, 295; and *Lush's Practice*, 546, 547.

⁴ *Colman vs. Roberts*, 1 Chitty Rep. 88; *Hayward's Bail*, *ibid.*

⁵ *People vs. Judges of Onondaga*, 1 Cowen, 54; *Flack vs. Eager*, 4 Johns. Rep. 185; *Thorp vs. Faulkner*, 2 Cowen, 514.

ing, a new undertaking must be entered into, and produced to the judge. A copy should, it is presumed, be delivered to the sheriff, and perhaps to the plaintiff.

Section 194.

“Qualifications of bail.”

“The qualifications of bail must be as follows :

“1. Each of them must be a resident and householder, or freeholder within the State.

“2. They must each be worth the amount specified in the order of arrest, exclusive of property exempt from execution ; but the judge, or a justice of the peace, on justification, may allow more than two bail to justify severally in amounts less than that expressed in the order, if the whole justification be equivalent to that of two sufficient bail.”

The only difference between this section and the 169th section of 1848 is the addition of the words “or a justice of the peace.”

The first essential qualification is residence. The meaning of this phrase is discussed under the title of Attachment, section 227, *post*.

The phrase “householder” has been used in the Code, instead of “housekeeper,” which we find in the English and our former rules. That phrase meant “a person actually occupying part or the whole of a house, being the party liable to the landlord for the entire rent, and assessed or liable for the parochial rates and king’s taxes.”¹

It has been held in England that the house must be within the jurisdiction of the court ; a person with lodgings in London, owning a house in Scotland, was not admissible.²

But the Code requires merely that the bail be a householder within the State ; and I believe the very general construction has been that it is enough to have a house at any place within it.

¹ Petersdorf on Bail, 273.

² Anon., 1 Dowling Pr. Cas. 1.

It is not material that the bail should have the exclusive possession of the house, provided he reside on the premises, and is responsible for the taxes and rent. The latter qualification is essential; for where the bail occupied every room in the house except one apartment, which the landlord used who paid the taxes of the whole, the bail was rejected.¹

A person who lived at lodgings, but paid his proportion of taxes and rates of a house occupied by his partner, and where the business was carried on, was held admissible.²

So, where the party had taken a house occupied by lodgers, and had received rent from one of them, he was allowed, without actual occupation.³

A person living in a house divided into several sets of residences, but a principal occupier, paying the rent and taxes of the whole, cannot be bail; but persons living in chambers, where each set of apartments constitutes a separate dwelling, and each occupier is assessed and liable for his separate rates and taxes, may be so.⁴

It has been held not to be essential that the party has been actually assessed for the taxes and parochial rates; it is sufficient if he be chargeable.⁵

It is to be noticed that the phrase *housekeeper*, in the English rule, is not equivalent to *householder*. On the contrary, it has been held that an affidavit that the party was a householder was insufficient.⁶

In so far as the practice has fallen within my own experience, it appears to require only—*first*, actual occupation, for a time of some duration, of a tenement, or a portion of it; *next*, ownership of such, and reception of rent; and in each case without regard to the fact by whom the taxes are paid.

Freeholders.—The next, or rather alternative, qualification is, that the party must be a freeholder. If a freeholder, it is unnecessary for him to be a householder.

The very general practice, I believe, is that adopted in the

¹ Slade's Bail, 1 Chitty Rep. 502.

² Savage vs. Hall, 1 Bingham, 430.

³ Cohn vs. Waterhouse, 8 Moore's Rep. 365.

⁴ Petersdorf, 275, and cases.

⁵ Ibid.; Anon., Lofft, 328.

⁶ 1 Dowl. Pr. Cases, 172.

Superior Court of New York, to consider that the ownership of a freehold in any part of the State meets the requirement of the Code. Its language is, "a freeholder within the State."

The point does not appear to be fully settled in England.

In *Boddy vs. Leyland* (4 Burrows, 2526), the bail justified in £9,000, inclusive of landed property in Jamaica, and was rejected. The same rule was laid down in *Wrightwich vs. Pickering* (Forest's Exch. Rep. 138). But in *Smith vs. Scamdrett* (1 Wm. Bl. 444), where one of the bail had estates in Antigua, but no effects in England, the court declared that merely having no property in England was not a sufficient objection.

In *Tomsey vs. Napier* (8 Taunton, 148), the Court permitted bail to justify as tenant by the courtesy of an estate in the Isle of Man.

In *Levy's Bail* (1 Chitty's Rep. 255), Best, J., held that bail could not justify in respect to property abroad.

In *Graham vs. Anderson* (4 M. & Sel. 371, 1 Chitty Rep. 285, *n.*), one of the bail, a natural-born citizen, was permitted to justify partly in respect of a landed estate in Surinam, and partly in respect of property in England. Bayley, J., observed, that "the plaintiff might, by pressing the bail, compel him to render his property abroad available." He afterwards said he had looked into the cases, which were contradictory, and that it must not be taken for granted that a party can justify in respect of property abroad, when he has no other property.

The provision of the Code appears to me to preclude a property qualification, when the property is out of the State; and as the jurisdiction of the Supreme Court extends over the State, and judgments in the Superior Court and Court of Common Pleas can be rendered effectual to reach property in any part of the State, it seems to me that a freehold situate in any part of it is a qualification.

Amount.—This is fixed, by the section, to be the amount specified in the order of arrest, exclusive of property exempt from execution. The affidavit, or justification, is to include the statement that the party is worth the sum specified over and above all just debts and legal liabilities. In *Hobson's case* (2 Chitty Rep. 95), it was ruled that an affidavit that A. and B., and each of them,

were worth double the sum sworn to in the affidavit to hold to bail, exclusive of all debts due to any other person, was sufficient. (See Burrill's Pr. 400.)

The clause allowing more than two bail to justify in amounts less than that specified in the order is taken from the practice of the King's Bench and the Exchequer. Three or four persons have been allowed to become bail where, from the magnitude of the amount, no inconvenience would arise to the plaintiff from having to seek small sums from numerous parties. (Petersdorf on Bail, 268, and cases.)

Disqualifications of bail.—The former rules as to the parties disqualified to become bail remain unaltered by the Code.

In *Wheeler vs. Wilcox* (7 Abbott, 74), the court say: "The Code (§ 194) prescribes expressly the qualifications of bail, without referring to what have always been held by the common law as disqualifications. The Code had left the law as it had always been."

In *Miles vs. Clark* (2 Bosworth, 709), the same principle was declared, and applied to the case of an attorney and counselor.

It may be stated as a general rule, that those persons who are exempted from being arrested themselves may not become bail for others. This is clearly so where the exemption is of a permanent character.

Ambassadors.—Ambassadors are clearly inadmissible, and probably their registered domestics are equally so.

Members of Legislatures.—Members of the House of Commons are disqualified, and their exemption is a permanent one from the time of their election until the prorogation or final dissolution of Parliament.¹

In *Graham vs. Sturt* (4 Taunton, 248), the objection was on the general ground that the proposed bail was a member of Parliament. The Court said: "We think he ought not to be bail, the difficulty of proceeding against him."

And in *Duncan vs. Hill* (1 Dowl. and Ry. 126), the rule was adopted in the King's Bench, as it had prevailed before in the Common Pleas, that a member of the House of Commons could not be bail.

¹ See Petersdorf on Bail, 49.

I judge that the disqualification lasts while the official character exists. The delay which may attend the proceeding is the ground of the rule. Whether the disqualification exists at all as to members of Congress, or of the Legislature, and, if it does, whether it does not exist only during the period they are privileged from being arrested, are points I have not found determined or examined in any case.

Attorneys.—In the case of *Miles vs. Clarke*, before cited, the subject was very fully examined by Justice Moncrief, of the Superior Court, who traced the history of the disqualification. It was held that the Code had not changed the former rule, and section 469 retained the practice. The attorney could not be bail.

According to the express rule of the Court of Common Pleas, and the settled practice of King's Bench, persons indemnified by the defendant's attorney cannot be admitted as bail; for if this practice were allowed, it would be a mere evasion of the rule, that no attorney should be bail.¹

Sheriff and officers.—By the English rule of long standing, no sheriff's officer, bailiff, or other person concerned in the execution of process, should be permitted or suffered to become bail in any action or suit depending in the courts.

In *Bailey vs. Warden* (20 John. Rep. 129), the sheriff of the county of Steuben, with another person, had become special bail. The English rule was recognized and adopted, and the justification set aside.

Section 195.

"Justification of bail.

"For the purpose of justification, each of the bail shall attend before the judge, or a justice of the peace, at the time and place mentioned in the notice, and may be examined on oath, on the part of the plaintiff, touching his sufficiency, in such manner as the judge or the justice of the peace in his discretion may think

¹ Petersdorf on Bail, 281.

proper. The examination shall be reduced to writing, and subscribed by the bail, if required by the plaintiff."

The section as enacted in 1848 was the same as at present, except that the words "or a justice of the peace," where they occur, were omitted; and the last words of the section, "if required by the plaintiff," were also omitted. The amendment of 1849 added these words; and the section has so remained since that time.

By the 5th of the Rules of Court, whenever bail are required to justify, they shall justify within the county where the defendant shall have been arrested, or where the bail reside.

It is usual for the defendant's attorney to attend with the ordinary affidavits of sufficiency. If the plaintiff should omit to attend, those laid before the judge will be sufficient to warrant the allowance. The English practice is similar. (Lush's Practice, 553, 554.)

If the plaintiff attend, he may proceed to examine the bail at large.

In a case at chambers before Mr. Justice Hoffman of the Superior Court, it was ruled that the ordinary affidavits of sufficiency and qualification should be laid before the judge, even when the plaintiff's attorney attended and examined. (See Rules of Supreme Court.) The examination by the plaintiff was in the nature of a cross-examination, and should be based upon the affidavit. See Laporte's Bail, 3 Dowling, 110, and Van Wezel *vs.* Van Wezel, 3 Paige, 38; Burrill's Practice, vol. 1, p. 401.

Section 196.

" Allowance of bail.

"If the judge or justice of the peace find the bail sufficient, he shall annex the examination to the undertaking, endorse his allowance thereon, and cause the same to be filed with the clerk; and the sheriff shall thereupon be exonerated from liability."

Section 171 of 1848 was slightly different. The present section has remained since 1849.

The allowance is endorsed, in general practice, upon the undertaking, in the form of an approval of the latter. Upon filing them with the clerk, the sheriff appears to be exonerated without any further order.

The section makes it the duty of the judge to cause the examination and undertaking to be filed.

Section 197.

“Deposit of money with the sheriff.”

“The defendant may, at the time of his arrest, instead of giving bail, deposit with the sheriff the amount mentioned in the order. The sheriff shall thereupon give the defendant a certificate of the deposit, and the defendant shall be discharged out of custody.”

This was the 172d section of 1848, and no changes have been made in it since that time.

By the statute of 43 George III., ch. 46, § 2, it was enacted that all persons who shall be arrested upon mesne process in England and Ireland shall be allowed, in lieu of giving bail to the sheriff, to deposit in the hands of the sheriff, by delivering to him or his under-sheriff, or other officers to be by him appointed for that purpose, the sum endorsed upon the writ by virtue of the affidavit for holding to bail in that action, together with ten pounds in addition to such sum, to answer the costs which may accrue or be incurred in such action, up to and at the time of the return of the writ; and shall thereupon be discharged from such arrest, as to the action in which he shall so deposit the sum endorsed on the writ.

So, by the act of 7 and 8 of Geo. IV. (ch. 71), a similar provision is made for a deposit instead of putting in and perfecting special bail, but twenty pounds are to be paid in as security for the costs.

This deposit is to be made at the time of the arrest, and in lieu of the bail. It is presumed that the party cannot be held at all after depositing the money.

There does not seem any obstacle to making the deposit, and thus releasing the bail if it has been first given, at any time before judgment. The 199th section provides for taking out the money, if deposited, upon giving bail at any time before. The act of Geo. IV., ch. 71, § 4, contemplates such a case, and appears to warrant a deposit, and exoneration of bail, at any period during the suit.

Thus, in *Salter vs. Weiner* (6 Abbott, 191), the defendant had been arrested by the sheriff of Niagara county, under an order of a judge of the First District, and held to bail in five hundred dollars. He deposited \$500 with the sheriff, who remitted it to the clerk in New York. The defendant subsequently procured bail who justified. An order to refund the money was then obtained. But, before the bail had justified, the plaintiff obtained a warrant of attachment in another suit against the defendant, and attached the \$500 in the hands of the county clerk. It was shown that the money belonged to a third person, and not to the defendant, to whom it had been lent to keep him out of jail. It was held to be the property of Weiner the defendant, and liable to the attachment.

Section 198.

“Payment of money into court by the sheriff.”

“The sheriff shall, within four days after the deposit, pay the same into court; and shall take from the officer receiving the same two certificates of such payment, the one of which he shall deliver to the plaintiff, and the other to the defendant. For any default in making such payment, the same proceedings may be had on the official bond of the sheriff, to collect the sum deposited, as in other cases of delinquency.”

The 173d section of the Code of 1848 was nearly identical in its language. In 1849 it was enacted as it now stands.

By the corresponding English statute (43 Geo. III., ch. 46, § 2), the sheriff, at or before the return of the writ, must pay into court the money deposited.

It deserves consideration whether, under the law with us, the sheriff may not be also proceeded against summarily to compel this payment, as well as be subject to proceedings on his bond. The Revised Statutes (2 R. S. 534, § 1) as to proceedings for contempts cover such a case. It would be a willful neglect of a duty. The statute regulating the proceedings on an official bond is found, 2 R. S. 476.

Section 199.

“Substituting bail for deposit.”

“If money be deposited, as provided in the last two sections, bail may be given and justified upon notice, as prescribed in section 193, any time before judgment; and thereupon the judge before whom the justification is had shall direct, in the order of allowance, that the money deposited be refunded by the sheriff to the defendant, and it shall be refunded accordingly.”

This section was enacted in the same form in 1848—being section 168.

In a case in January, 1860 (Superior Court, Hoffman, Justice), the bail appeared before the judge and justified. Their affidavits were annexed to the undertaking, and an order was indorsed on this approving and allowing the bail and undertaking, and ordering the money to be refunded to the defendants. By the English statute (7 and 8 Geo. IV., cap. 71), the party making the deposit may receive the same out of court, upon putting in and perfecting special bail, at any time before issue joined in law or in fact, or final or interlocutory judgment signed.

After issue joined, or after judgment, it is too late to apply; but the court has granted a rule *nisi*, with a stay of proceedings, until it might become absolute, to prevent issue being joined.¹

If the money is not thus withdrawn, it must remain in court to abide the event of the action. The courts have no power to

¹ Bull *vs.* Turner, 1 Meeson & Welsby, 47; Welshman *vs.* Sturgess, 13 Q. Bench Rep. 556; Bloor *vs.* Cox, 6 Dow. Pr. Ca. 266.

apply it to a plea of tender or payment into court. (*Stultz vs. Heneage*, 10 Bingh. 561.)

In *Douglass vs. Stanborough* (3 Adol. & Ellis, 316), where the friend of the arrested party had made a deposit on his behalf instead of bail, which deposit had been paid into court, and the defendant surrendered himself, it was held, that the depositor might have the money returned on motion, the defendant consenting. The render was equivalent to the putting in and perfecting of bail.

Section 200.

“Money deposited, how applied or disposed of.”

“Where money shall have been so deposited, if it remain on deposit at the time of an order or judgment for the payment of money to the plaintiff, the clerk shall, under the direction of the court, apply the same in satisfaction thereof; and, after satisfying the judgment, shall refund the surplus, if any, to the defendant. If the judgment be in favor of the defendant, the clerk shall refund to him the whole sum deposited and remaining unapplied.”

This section has remained in the same language since the first passage of the Code, in 1848. It was the 175th section of that year.

By the English practice, when the suit has been terminated by judgment or otherwise, the successful party may apply, on an affidavit of the facts, to have it paid out. He is bound to resort to this fund in the first instance, and cannot pass it by and issue execution for the whole amount of the judgment. Cause against the rule may be shown, as that the party has brought error, or obtained a new trial.¹

¹ Lush's Practice, 540, and cases.

Section 201.

“Sheriff, when liable as bail, and his discharge from liability.”

“If, after being arrested, the defendant escape or be rescued, or bail be not given or justified, or a deposit be not made instead thereof, the sheriff shall himself be liable as bail. But he may discharge himself from such liability by the giving and justification of bail, as provided in sections 193, 194, 195, and 196, at any time before process against the person of the defendant, to enforce an order or judgment in the action.”

The 176th section of 1848 was in all respects the same, except in the numbers of the sections referred to. It was enacted in its present form in 1849.

In these instances, the sheriff becomes the substituted bail to the plaintiff, and the bail taken by him become bail to him. (*In re Taylor*, 7 Howard, 212.) As bail, he becomes entitled to all the rights and remedies which he would have possessed had his name been on the undertaking.

In *Buckman vs. Carnley*, sheriff (9 Howard’s P. 180), the sheriff had arrested the original defendant, and taken the usual undertaking. Notice of non-acceptance was given by the attorney of the plaintiff under section 192, and the bail did not justify, nor was other bail given, nor a deposit made.

A *ca. sa.* was returned, “not found,” on the 5th of October, 1850. On the 20th of November the present action was commenced. On the same day a notice was given, signed by Mathew H. Chase (deputy sheriff), of an application to exonerate him as bail, for the 30th of the month, accompanied with a paper, purporting to be an undertaking signed by him as bail, filed Oct. 30, 1850, and a certificate by the under sheriff that the defendant was in the custody of the sheriff.

Woodruff, Justice, held: The liability of the sheriff as bail was fixed, bail not having justified, nor a deposit been made. He had become liable as bail, but only as such, and might be dis-

charged in the same manner. That the sheriff could, after action brought against him, be exonerated by a surrender under section 191. An opportunity was given to him to make a regular application.

In *McGregor vs. Willett*, sheriff (17 Howard Pr. 439), the late sheriff applied to be exonerated, upon the surrender and commitment of Cohen to the custody of the present sheriff. The action against him had been commenced in December, 1858, to make him liable for an escape. Cohen had been arrested in an action against him in October, 1857. After judgment, he was taken and imprisoned on execution against his person. On the 10th of December, 1858, he escaped. He broke jail without the privity or knowledge of the defendant. An order to extend the time for a surrender had been granted on the 24th of May, 1859. He was surrendered about that time. The present sheriff had Cohen in custody, on an execution in another suit. The commitment indorsed on the execution served on the sheriff was held equivalent to actual arrest and commitment, and operated as a detainer.

The court (Hoffman) said: By the Code, in case of an escape, or that bail has not been given or justified, the sheriff becomes responsible as bail. (§ 201.)

His privilege as bail must be commensurate with his liability. Whenever bail given by another can be relieved, he may be. Bail can surrender within the time prescribed in section 191, and there was nothing to create an exception in the case of the sheriff. The application was in time, and was granted.

In *Sartos vs. Merceques* (9 Howard, 188), the doctrine of *Buckman vs. Carnley* was reiterated. The sheriff rearrested a defendant who had failed to justify. It was held that as bail he could do this, and a motion to discharge the defendant was denied.

The sheriff's right to discharge himself in the manner which other bail are entitled to pursue, must be exercised before process against the person of the defendant. It is not provided whether this is before such process issued or executed.

In *Metcalf vs. Stryker* (10 Abbott, 12), it was held, that a sheriff, sued upon his liability as bail, under section 201, could

not avoid or reduce it by showing that the arrested debtor was insolvent, and had no property which was not exempt from execution, and had ever since remained in the same condition.

Where bail do not justify, the sheriff becomes liable as bail in the action, and his liability is commensurate with that of any other bail.

An action against the sheriff on his liability as bail, is not an action for neglect of his official duty. The damages are the amount of the judgment.

In *Seaver vs. Gurner* (10 Abbott, 256), the sheriff had become fixed as bail by reason of the sureties not justifying. He re-arrested the defendant, and this was held lawful.

Section 202.

“Proceedings on judgment against sheriff.”

“If a judgment be recovered against the sheriff upon his liability as bail, and an execution thereon be returned unsatisfied, in whole or in part, the same proceedings may be had on the official bond of the sheriff to collect the deficiency, as in other cases of delinquency.”

This is the same as section 177 of 1848, and has remained unaltered since.

The sheriff becomes bail himself in the particular cases specified in section 201, and it is presumed that section 190 applies to this case; and the proceeding against the sheriff can only be by action. If this is so, then the old practice of proceeding against the sheriff, by attachment, when bail is not put in and perfected, would seem to be superseded. (See *Burrill's Practice*, vol. 1, p. 363.) I am not aware of any authority upon the point.

For the statute as to proceedings on an official bond, see 2 R. S. 476.

Section 203.

"Bail liable to sheriff."

"The bail taken upon the arrest shall, unless they justify, or other bail be given *or* justified, be liable to the sheriff by action, for damages which he may sustain by reason of such omission."

Section 178 of 1848 was the same as this section, except that the word *or*, above, italicized, was *and*. In 1849 the word *or* is found in the section, and so in 1851, and since.

In re Taylor (7 Howard, 212), Taylor was held to bail in \$10,000, and an undertaking, signed by ten persons, was given. The plaintiff's attorney excepted to the sufficiency of the sureties. They did not justify. Eight of the sureties procured a certified copy of the undertaking, and endorsed thereon an authority to one Muir to arrest the petitioner defendant, for the purpose of surrendering him to the sheriff, which was done. He was brought up on habeas corpus.

Humphrey, county judge, held, that the Code had made bail taken on an arrest to supply the place of bail to the sheriff, and special bail of the Revised Statutes. Section 203 made bail not justifying liable to the sheriff; and section 201 made the sheriff liable to the plaintiff. The sheriff in such case is bail to the party, and the non-justifying sureties bail to him.

By the Revised Statutes, bail to the sheriff, as well as special, had the power of surrendering their principal; and the section of the Code conferred the power on the bail, which is made to answer each, according to the exigency of the case.

As bail to the sheriff, they had a right to surrender.

He also held that the signatures of eight of the ten, to the authority to make the arrest, was sufficient.

Section 204.

“Motion to vacate order of arrest, or reduce the bail.”

“A defendant arrested may, at any time before judgment, apply, on motion, to vacate the order of arrest, or to reduce the amount of bail.”

By the amendment made in April, 1862, to the 183d section of the Code, it is provided that the “defendant shall have twenty days after the service of the order of arrest in which to answer the complaint in the action, and to move to vacate the order of arrest, or to reduce the amount of bail.”

In 1848, and through all the amendments of the Code until 1858, the clause was, *at any time before the justification of bail* he might apply.

In 1858 the change was made, and the application permitted at any time before judgment.

The various cases interpreting the provision as it stood before 1858 were superseded by this amendment, and the rulings and distinctions found in them need not be stated.¹

The language of the court in *Stewart vs. Howard* (15 Barbour, 26), appears to intimate that putting in bail was a waiver of any objection to the sufficiency of the original affidavit. This, however, was not the rule, and I presume the case is not so to be understood. Until justification, or expiration of the time to except, a motion to vacate could be made upon the defects of the original papers, as fully as upon new ones. (5 Howard, 251; 4 Abbott, 104; 3 Howard, 265; 8 Howard, 353; 12 *ibid.* 197.)

Motion to vacate order.—The time within which the motion to vacate the order might be made, before 1862, was the same as the time within which such order might be granted under section 183, viz., before judgment. The case of *The Union Bank vs. Mott* (8 Abbott, 150),² stated under that section, was applicable here. Indeed, it arose upon a motion to vacate an order.

¹ *Dale vs. Radcliff*, 15 Howard, 70; *Cady vs. Edwards*, 12 *ibid.* 198; *Stewart vs. Howard*, 15 Barbour, 26; *Columbia Ins. Co. vs. Force*, 8 *ibid.* 153; *Gassney vs. Burton*, 12 *ibid.* 516; *McKenzie vs. H—*, 2 E. D. Smith, 75; *Lewis vs. Truesdale*, 3 Sandf. 706.

² *Ante*, page 52.

In *Crowell vs. Brown* (17 Howard, 68), judgment had been entered against the defendant; and then (as it seems from the statement) a motion was made to discharge the order of arrest. A *ca. sa.* had been issued upon the judgment. The case seems to have arisen upon a motion to discharge the defendant from imprisonment under this writ, and the question arose, under sections 179, 181, whether an execution against the person was justified when an order of arrest had been obtained and remained in force. He could not move to discharge the original order, and hence could not relieve himself from the execution.

In *Roberts vs. Carter* (9 Abbott, 106, note), the defendant, upon being arrested, gave bail, who justified. After judgment he was arrested on execution against his person. On motion to vacate the order, it was held that such a motion could only be made before judgment, and the application was denied. *Cromwell vs. Brown* (*ibid.* note) is to the same effect.

The amendment of 1862 appears to substitute a new and definite rule for the time of moving, viz., twenty days after service of the order.

On affidavits.—If the motion is made upon the plaintiff's affidavits solely, the facts stated therein must be taken as true; but they may be construed with strictness against him.¹

Where the case made by the complaint varies from that made by the affidavits, and the affidavits were themselves sufficient to sustain an arrest, and on a ground not inconsistent with the allegations, an arrest has been sustained.

Thus, in *Stelle vs. Palmer* (7 Abbott, 181), it was held, that the insertion in the complaint, which was for money received, of allegations showing a fraud in investing such moneys in fictitious and worthless notes, where an arrest had been obtained upon an affidavit to these facts, could not affect the right to an arrest. A motion to correct the complaint might be the proper course. (*Eddy vs. Beach*, 7 Abbott, 18.)

In *Wicher vs. Harmon* (21 Howard's Pr. Rep. 462), it was decided that no order of arrest should be granted in an action on contract where the allegations of the complaint are inconsistent with material allegations contained in the affidavits upon which the order of arrest was made.

¹ *Hathorn vs. Hall*, 4 Abbott, 227.

Upon an appeal to the General Term from an order denying a discharge of an order of arrest, the objection, that the affidavit was on information and belief, will be disregarded, if the principal allegations are not explained or denied. (*Union Bank vs. Mott*, 17 Howard, 354.)

Variance between affidavits and complaint.—In *Lambert vs. Snow* (9 Abbott Rep. 51), it was held, by the General Term of the Common Pleas, that where a defendant had been arrested for money received in a fiduciary capacity, and the complaint subsequently served united a cause of action on contract for which he could not have been arrested, he should be discharged. The order must relate to the whole case presented, not to a part of it. He was discharged.

In *Taylor vs. Wilkinson*, 1837 (6 Adol. & Ellis, 533), the defendant had been held to bail on an original writ; after declaring, the plaintiff amended his declaration, adding fresh counts. He recovered a verdict on all the counts, with damages assessed severally on each. He then taxed his costs, without severing the costs incident to the new counts from the others. The bail was held liable, on demurrer, to an action for the damages given on the counts which corresponded with the cause of action in the original writ, and for those only; and as the costs ought to have been separated by the plaintiff, which he had not done, he could not have any against the bail. See the case on the pleadings, 3 Adol. & Ellis, 784.

Patterson, Justice, put this case: "It is like the case of an original writ issued for causes of action, some of which are bailable, some not; the bail are liable only on the first."

In *Wheelwright vs. Jutling* (7 Taunton, 304), on a rule *nisi* to stay proceedings against bail, it was shown that the affidavit to hold to bail stated only that the defendant was indebted on a bill of exchange. In the declaration there was added a count for goods sold and delivered. Plaintiff obtained judgment by default. On the writ of inquiry, he recovered for the goods only, which were, in truth, the consideration of the bill, and gave no evidence under the count upon the bill.

Dallas, Justice: When we look to what is technical, we find no difference of opinion in the officers or the court; when we look to the books of practice, the text is positive; when we

look to the reason of the thing, it is, that if bail are told there is a debt of £167 due on a bill of exchange, they shall not be liable for goods sold and delivered. The bail ought to know the extent of their responsibility, else it is a fraud on them.

In *Cunliff vs. Mattass* (7 Comm. Bench Rep. 695), a *capias* was issued upon a judge's order, pursuant to 1 and 2 Victoria 110, § 3, indorsed for bail in £1,050. The affidavit stated four distinct causes of action—three of them correctly, and one imperfectly. The defendant applied to be discharged. The motion was denied, but the bail was reduced by the £500, as to which the cause of action was insufficiently stated. The defect was, in not alleging presentment, dishonor, and notice, of a bill of exchange. *Jones vs. Collins* (6 Dowl. Pr. Ca. 526) and *The Bank of England vs. Reid* (8 Dowl. Pr. Ca. 848) are to the same effect. "The result is, that when the affidavit discloses a good cause of action, the defendants may be held to bail for that, notwithstanding the affidavit also states something further which does not amount to a cause of action."

In *Pell vs. Gregg* (4 Cowen, 427), the *ac etiam* was "for speaking certain slanderous and actionable words," and the declaration was for maliciously suing out an attachment under the Absconding-debtor Act, upon the false affidavit of the defendant, &c. The court granted a motion to enter an *exoneratur*.

In *Robeson vs. Thompson* (4 Halsted's N. J. Rep. 97), it was laid down, that where the cause of action set forth in the declaration is substantially variant from the cause of action in the affidavit, the bail must be discharged.

See, further, *Mayfield vs. Davidson*, 10 Barn. & Cress. 223; *Taylor vs. Gregory*, 2 Barn. & Adol. 257; *Ward vs. Tummon*, 1 Adol. & Ellis, 619; *Taylor vs. Wilkinson*, 3 Adol. & Ellis, 784; and *Thompson vs. Macirone*, 4 Dow. and Ry. 619.

From these authorities I think it may be deduced, that a variance between the case made in the affidavit and that in the complaint, or on which judgment is obtained, when that variance is substantial and makes a new case, operates to discharge the bail. If there have been amendments made, under the sanction of the court, which do not entirely or substantially change the ground of action, the bail will continue liable. It would seem, also, upon the English cases, that if a cause of action sufficient to justify an

arrest, is united with another cause of action, the bail would remain liable, provided there is a recovery on the former cause. Under our system of pleading, it may be doubted whether, when the plaintiff has several demands which he may or ought to unite in one action under § 167, and on one of them he can have an arrest, the union of the others shall preclude him from it.

Dealing with principal.—The relative situation of debtor and bail is that of principal and surety, and the rules of law growing out of that relation are applied to the discharge of bail.

In *Melvill vs. Glendining* (7 Taunton, 126), Gibbs, Ch. J., thus stated the rule: The doctrine was first introduced in courts of equity that, if the creditor gives time to the original debtor, the surety is discharged. The courts of law have held, with respect to bail, that the bail are entitled to surrender their principal at any time, whenever the plaintiff himself would not be precluded from taking, or proceeding against him. If the creditor give time to the principal, he cannot, during that time, take or proceed against him, neither, during the same period, can the bail; who are therefore discharged.

The court, being satisfied that the bills of exchange taken as securities were not to prevent the plaintiff going on, by express agreement, the bail were held not discharged.

In *Rathbone vs. Warren* (10 John. Rep. 597), this principle of the relation of bail was adopted, and the plaintiff, having permitted the debtor to go to sea, agreeing not to issue execution against him until after a certain day, for which a sum of money had been paid,—all without the privity of the bail,—the latter was held to be discharged.

In *Willison vs. Whitaker* (7 Taunton, 53), the principal had procured a surety to accept bills for the debt, payable at a future day. He had therefore purchased the privilege of freedom from arrest (after judgment) until it should be seen whether the bills would be paid or not. Proceedings against the bail were stayed on payment of costs of the motion and of the action.

In *Stevenson vs. Roche* (9 Barn. & Cress. 707), it was ruled, that bail are not discharged by the creditor taking a *cognovit* from the debtor, unless, by its terms, he is to have a longer time for the payment of the debt and costs, than he would have had if the plaintiff had proceeded regularly in the action.

The affidavit should expressly and fully set forth what is sworn to on knowledge, and what on information and belief. A material variation will entitle the party to a discharge.

Thus, in *Moor vs. Calvert* (9 Howard, 475), it appeared that the plaintiff swore to the fraudulent acts as of his personal knowledge, and it turned out that the acts and conversations which were alleged to be with a fraudulent intent were made with the clerk of the plaintiff, and communicated to him. The defendant was discharged.

In *Larcom vs. Herzfeld*,¹ the same point was ruled.

Section 205.

"Affidavits on motion."

Motion on defendant's affidavits.—"If the motion (to discharge the arrest) be made upon affidavits on the part of the defendant, the plaintiff may oppose the same by affidavits or other proofs, in addition to those on which the order of arrest was made."

Section 180 of the Code of 1848 was the same, and the provision has remained unaltered.

When the affidavit of the plaintiff is only on information and belief, a positive denial by the defendant of the material statements is sufficient to procure his discharge. This was held by Justice Ingraham, in the case of *Rigney vs. Talmadge*, Sept., 1859, in the case of an attachment.

Where the arrest had been granted on an affidavit, in general terms, "that the defendant Woodcock is about to dispose of the money, drafts, and property of the firm, with intent to defraud the creditors of the firm," the defendant, on moving to vacate it, made an affidavit of denial equally positive and equally general. It was held, that the original affidavit was insufficient; but if this were otherwise, the equally general denial was sufficient to put the plaintiff to state facts and circumstances warranting the court

¹ Special Term Superior Court, May, 1857, Hoffman, J.

in finding such a conclusion. This not being done, the order was discharged.¹

The plaintiff is not at liberty, upon a motion thus made, to vary the grounds or cause upon which the order was originally made. His new affidavits must be to sustain that ground, or to displace or affect the counter statements relied on by the defendant.

This was held in *Cady vs. Edmonds* (12 Howard's Pr. Rep. 197); and in *Henz vs. The Long I. R. R. Co.* (13 Barbour, 646), a similar rule was declared in the case of an injunction.

The mere denial of the cause of action, or the mere denial of the facts on which the arrest was obtained, is not sufficient to discharge an order when the facts are sufficiently stated to support it.²

Trial of liability on affidavits.—One of the most important questions arising under this section is, How far the court is authorized to try the liability to arrest upon affidavits?

The section, beyond doubt, contemplates such a trial, and apparently in every instance. The Court of Appeals, in *Corwin vs. Freeland* (2 Selden, 564), state that the Legislature has provided this mode of trying the question, and that it is not without its advantages to the defendant. This is said in a case where the arrest had been made in an action to recover the value of goods sold, and the arrest was made on the ground of fraud in making the purchase.

Yet distinctions are taken, and supported with great authority, of importance to be noticed.

One point may be presented in the language of that eminent jurist, Chief Justice Duer, of the Superior Court.

In the *Republic of Mexico vs. Arrangoiz* (5 Duer, 634), he says: "It is undoubtedly true that, when an order of arrest is founded upon extrinsic facts, wholly unconnected with the right of the plaintiff to maintain the action, as that the debt sought to be recovered was fraudulently contracted, the burthen of proof rests upon the plaintiff; and, consequently, if the affidavits on the part of the defendant deny positively the imputed fraud, and

¹ *Brown vs. Woodcock*, Special Term Superior Court, September, 1859, Hoffman, Justice.

² *Bedell vs. Sturta*, 6 Abbott Rep. 319, n.; *Chittenden vs. Hubbell*, *ibid.*

the question whether any was intended or committed, upon the whole evidence, remains in doubt, the defendant will be entitled to his discharge. It will be the duty of the court to determine the question precisely as it ought to be determined were it submitted to a jury."

"But when the facts relied upon (by the defendant) constitute a defence to the action, that, if admitted or proven, would bar a recovery, it is the defendant who, in relation to these facts, holds the affirmative; and it is upon him, therefore, that the burthen of proof is necessarily cast; and hence, if he fail to satisfy the court that the defence relied on will certainly be established on the trial, the application for the discharge ought to be denied."

The first portion of the chief justice's opinion is supported by such a strength of authority as to afford no room to question its undisputed law. The next proposition presents the case (as it is supposed) of a defence of new matter; for example, a composition or discharge, and an admission, implied at least, of the original cause of action and ground of arrest.

We are thus presented with the case of an affirmative new defence to the action; the defendant must make that out clearly to entitle himself to a discharge, just as the plaintiff must make out clearly his case to entitle himself to retain the order.

But another question has arisen. This relates to the rule, where the facts constituting the ground of arrest are identical with the facts constituting the ground of action, and where they are distinct.

A discussion on this subject is found in the careful and able opinion of Justice Marvin in *Frost vs. McCarger* (14 Howard, 131). The case made by the complaint was this: that the defendant was agent of the plaintiffs, appointed by them in Wisconsin to deliver certain property to purchasers elsewhere. The property placed in his hands was delivered to the purchasers, and he received the purchase money. Then the complaint alleged that the defendant embezzled and fraudulently secreted and made way with the moneys, and converted them to his own use.

The defendant asserted that he had lost the money; and, on a motion to vacate an arrest, numerous affidavits were read, on both sides, bearing upon this allegation.

It was held that the defendant was liable to arrest, on the

ground that the money was received in a fiduciary capacity. It was next stated that the loss of the money, under such circumstances as would exonerate him from the liability, was matter of defence to the action.

The learned justice then cites *Hernandez vs. Carnobelli*, and the Republic of Mexico *vs. Arrangoiz*, and observes that he cannot agree with the justice who decided those cases, in regard to that class of cases, when the same facts which constitute the cause of action justify the arrest. The opinion proceeds with great clearness to discuss the question. Two passages contain the results of the judge's views: "In any case where the facts justifying the arrest differ from the facts constituting the cause of action, and are not to be brought before the jury upon the trial, there is an absolute necessity that the court should consider the evidence *pro and con*, upon a motion to discharge the order of arrest, and decide the disputed question according to the weight of evidence."

"This necessity does not exist in those cases where the facts constituting the cause of action and authorizing the arrest are the same. The facts will be tried by a jury when the action is tried; and the verdict, which establishes the cause of action, will, at the same time, show conclusively that it was a case for arrest; a verdict for the defendant will negative the cause of action and the right to imprison."

It will be noticed that, in this leading case, a cause of arrest—viz., the debt incurred from the mere reception of the money in a fiduciary capacity—was a ground of arrest held good by the judge, independent of the fact of embezzlement or fraudulent conversion. It is presumed that the allegations of this nature in the complaint were not necessarily there. It may well be that their insertion did not prejudice the right to an arrest. And so it was held by one of the justices of the Superior Court;¹ but,

¹ Hoffman, Justice, Special Term, October, 1854. *Brady vs. Bissell*. The complaint set forth an employment of the defendant to recover a pension and delivery of a certificate pension to him, his collection of the money from the Government, and responsibility for the amount. It also set forth that the defendant had, by false representations of the difficulty and improbability of success, induced him to make an assignment of his claim for a small sum of money. On this an order of arrest was made. The affidavits stated the facts more fully.

certainly, the facts to justify the arrest on the ground of embezzlement, were entirely extrinsic to the cause of action.

But was not the fiduciary capacity also an extrinsic fact? The reception of the money alone gave a cause of action, but did not give a right to arrest. The peculiar character or relation of the party receiving it was necessary for this.

The rule thus stated by Justice Marvin is repeated in other cases.¹

In *Goodrich vs. Dunbar* (17 Barbour, 647), where the defendant was, under the circumstances, held not to be acting in a fiduciary capacity, and a judgment having been obtained, the original cause of action was considered merged. The court observed: "It was said that an action might be brought as for goods sold only, and in the complaint no mention need be made of any fraud in contracting the debt, and yet the defendant might be held to bail for such fraud. That was so, and arises from the difference of language in subdivision 2, from that in subdivision 4, of section 179. Subdivision 4 is, that 'the defendant may be arrested who has been guilty of a fraud in contracting the debt, or incurring the obligation, for which the action is brought,' showing that the action is to be for the debt or obligation only, but the arrest for the fraud in contracting that debt or obligation."

"In subdivision 2, the language clearly restricts the right to arrest to certain kind of *actions*. It is an *action* for a fine or penalty, or on a promise to marry, or for money received, or property embezzled, or fraudulently misapplied by a public officer, &c., or by any factor, agent, broker, &c. The action must be for the fine or penalty, promise to marry, &c., or it does not come within this subdivision."

This case points out the line of distinction between cases in which there must, of necessity, be an identity between the cause of action and grounds of arrest, and other cases.

Chapin vs. Seely (13 Howard, 490) was the case of a party arrested, as an agent of the plaintiff, for not paying over money received by him in that capacity.

¹ *Gellen vs. Seixas*, 4 Abbott, 103, *anony.* cited; 6 Abbott, 319, *note*. In the late case of *Barrett vs. Gracie*, 34 Barbour, 20, Mr. Justice Barnard adopted the reasoning of Justice Marvin, and held that, where the facts were identical, the defendant must make out a case so plain as to justify a non-suit.

Hernandez vs. Carnobeli (10 Howard, 449 ; 4 Duer, 644), was an action of assault and battery and false imprisonment. Mr. Justice Hoffman stated his view of the rule thus : " I have before stated the principle upon which I think the court is to act. The inquiry is to be, whether, upon the whole case as presented, a verdict ought to be given by a jury, or a judgment by a judge, for the plaintiff or defendant. If the questions are doubtful, then the plaintiff has not made out his case, and the defendant should be discharged. It is in this particular that I differ from some able judges, who incline to hold that the defendant is to make out clearly that the plaintiff cannot succeed.

In *Barren vs. Sanford* (7 Dist. Special Term, June, 1857), before E. D. Smith, Justice (6 Abbott Rep. 320, *n.*), the case was for debt, and the arrest was upon the ground of its being fraudulently contracted. The learned justices quotes *Hernandez vs. Carnobeli* (10 Howard, 449), where Justice Hoffman says : " If the question is doubtful then the plaintiff has not made out his case, and the defendant should be discharged ;" and adds : " I cannot see why this is not the true rule, if the whole question is to be considered raised on the motion as *res nova* ; for the party seeking the benefit of bail holds the affirmative and should make out his case. And yet I am not quite satisfied that it is safe or proper to dispose of these motions on this ground."

The necessity of carefully ascertaining when a ground of arrest is distinct from the cause of action is apparent. Generally speaking, in actions resulting from contract, they will be distinct. One exception readily occurs : If the price of goods is not due, and the purchaser has been guilty of fraud in obtaining them, the time of credit is disregarded, and the plaintiff has a right to sue immediately for the price. Yet, in this case, his right to sue before the expiration of the credit, depends upon the fraud, and that must be stated in his complaint, or his action would be premature. It may, then, be urged that there is, under such circumstances, the identity spoken of. Yet even this proposition may be subjected to cavil and doubt. The substantial cause of action is the sale of the goods, and liability for the price. The credit is extraneous.

If, however, the time of credit has expired, the cause of action and the ground of arrest are separate.

It may be suggested, whether the practical and true test is not this. If the statements, essential to support the action (and hence to be made in the complaint), are essential, and all that are essential, to warrant an arrest,—and, conversely, if the statements to warrant the arrest must be in the complaint to support the action,—the identity is established.

Tested by this rule, the actions for injury to person, or character, for a fine or penalty, and on a promise to marry, are plainly actions in which the identity exists. Actions where the cause of action depends upon a debt, or obligation incurred, which *per se* gives a right to sue, and the cause of arrest is something connected with that cause of action, but so independent of it that the action could have been sustained without it, are of the other class.

But, after all, the important question is, whether there is any just ground for the distinction which has been taken, between the different causes of arrest. The case has always appeared to me very strong when thus presented. The imprisonment of a party in a civil action is expressly and by statute prohibited, unless the plaintiff establishes the exceptional cases. No discrimination is found resulting from the particular form of action or ground of arrest. Something must be affirmatively made out, sufficient to satisfy the judicial mind, that an exceptional case has been established, before an arrest can be originally ordered. And I am at a loss to understand why this affirmative obligation does not rest upon the plaintiff, through every stage of the action, and in every action of every nature. The Code prescribes, that a man may be arrested when he has committed an assault and battery, and also when he has contracted a debt fraudulently. It has bound the court to say positively, just as much in the one case as in the other, that the act has been done, or the arrest cannot be sustained. The same rule must exist as to continuing, as prevails as to granting an arrest. In each case, the defendant has a right to call upon the court to pronounce, whether the plaintiff has made out his case. The judicial mind must act upon that case as it must do in every other question of difficulty.

I do not appreciate the objection, that the court thus prematurely passes upon the case between the parties, and the merits of the action, which may prejudice the trial. The trial will be con-

ducted on the evidence then produced, sifted, and duly weighed. The case will, we are bound to assume, be decided by what then appears, and by that only.

It is interesting and important, upon this point, to advert to some decisions in England, under the statute of 1 and 2 Victoria. In *Stammey vs. Hughes & Stanley* (18 Comm. Bench Rep. 507, 1856), the defendants were arrested on an affidavit of debt for work and labor, money laid out, &c.; that Emma Stanley had accepted an engagement to sing in New York; that she would sail for that place on or about the 20th of May, and the plaintiff verily believed he would lose the debt, unless the said Emma was forthwith apprehended and held to bail. She deposited with the sheriff the amount of the debt, and £10 costs.

On a motion that the money be returned, the debt was fully denied in affidavits, stating that the claim was founded on an agreement, which was set forth. It was alleged to have been put an end to. Of this the court was satisfied, and that it was plain there was no cause of action. A rule for the return of the money was made absolute. Creswell, Justice, said: "The case of *Pegler vs. Hyslop* is a distinct authority to show, that the court has power to enter into the inquiry. The very words of the 3d section of the 1st and 2d Victoria, ch. 110, show it. I do not see why the defendant should not be permitted upon a motion of this sort, to controvert the existence of the debt." Williams, Justice, concurred, adding, "At the same time, I have always said, that I would not take upon myself to try a question which was at all doubtful."

Pegler vs. Hyslop is to be found in 1 Exch. Rep. 437. Parke, Baron, there said: "I think the words of the statute leave the whole matter at large. Under the statute 12 Geo. I., ch. 29, the plaintiff had a right to arrest the defendant on one condition only, that he made an affidavit of the cause of action, and that affidavit could not be contradicted. But the statute 1 and 2 Victoria, ch. 110, differs from that very materially." The 3d and 6th sections are then referred to. The judge proceeds: "The whole matter is, therefore, left at large by the wording of the statute, and the defendant is not precluded from disputing, at this stage of the proceedings, either the cause of action or other matters which the plaintiff's affidavits contain. Acting on this view,

I have relieved parties, where the debt was barred by the statute of limitations. It must, however, be a very clear case, that the plaintiff has no cause of action, or we should not interfere."

Copeland vs. Child (22 Law J. Rep. Q. B. 279) is a case before decided by Mr. Justice Coleridge, in conflict with this decision. It is cited, and must be treated as overruled, at least in the exchequer.

In the late case of *Warren vs. Wendell* (13 Abbott's Rep. 187, Nov. 1861) the complaint contained allegations of fraud in contracting the debt. On affidavits an order of arrest had been granted. On the trial of the issues, the judge found that there was no fraud. It was held that this adjudication was decisive upon the question of arrest, and the order was vacated. The judge observed, "The plaintiffs claim that the issue as to the fraud was improperly in the pleadings, citing 13 Howard, 230, 20 *ibid.* 236, both based on 2 Selden, 560; but, with all deference to both the opinions in Howard, it would seem that they err in saying that the case in Selden is an authority for the position that such allegations cannot be properly made in the complaint."

Reference.—In *Barron vs. Sandford* (14 Howard, 443), Justice E. D. Smith held that where there was a conflict of affidavits, it was proper to refer the affidavits to a referee, and require the parties to submit to an oral cross-examination, in respect to the facts stated in them, with leave to either party to call and examine other witnesses on the question. He made such an order, the referee to report the evidence, and his finding thereon.

In *Stelle vs. Palmer* (7 Abbott, 181'), it was stated that the practice was scarcely known in the Superior Court; that the power was probably not to be questioned, but the case ought to be very special, and where the judge could in no way come to a definite conclusion on the facts before him. There was there no point to which affidavits on each side had not been directed, or could have been directed; there was nothing of surprise or deception. A motion for a reference was denied.

In *Sturm vs. Van Camp and others* (Supreme Court, 1st District, November, 1854), it was held that as various questions of fact were left in doubt by the affidavits, there should be a

¹ Superior Court, Special Term, Hoffman, J.

reference to take proof of the facts; and the referee should be directed to take no statement on information or belief, unless it be shown whether the information was in writing or not, and if in writing, unless the writing be produced; and if not in writing, then, unless the source of the information be particularly stated, and also, as nearly as practicable, the language in which it was communicated.

Discharged, if obtained by deceit.—An order of arrest will be discharged, if the plaintiff has effected it by enticing the defendant fraudulently within the bailiwick of the sheriff.

This was ruled in *Goupil vs. Simonson* (3 Abbott's Rep. 474), and in *Carpenter vs. Spooner* (2 Sandf. Sup. Ct. Rep. 717).

In *Stein vs. Valkenhuyzen* (1 Ellis, Black. & Ellis, 65), a creditor by a concerted plot induced the defendant to come from Paris to London, where he immediately had him arrested by order of a judge. The court, upon affidavits, set aside the whole proceedings as an abuse of its process.

The power of the court is undoubted, and is frequently exercised, to impose a condition upon the defendant that he shall not bring an action for false imprisonment, or damages. (*Croden vs. Drew*, 3 Duer, 655; *Northern R. R. Co. vs. Carpentier*, 4 Abbott, 47.)

Arrest on execution.

Section 288 of the Code provides, that "if the action be one, in which the defendant might have been arrested as provided in sections 179 and 181, an execution against the person of the judgment debtor may be issued to any county within the jurisdiction of the court, after the return of an execution against his property unsatisfied in whole or in part."

This section has been the subject of a number of conflicting decisions. Many of them are referred to in a note to *Barker vs. Russell*, 11 Barbour, 384.¹ See also *Alden vs. Savron*, 4 Abbott, 102; *Crowell vs. Brown*, 17 Howard, 68; *Humphreys vs. Brown*, *ibid.* 481; *Ginochio vs. Figari*, 4 E. D. Smith, 227; *Fake vs. Edgerton*, 3 Abbott, 230, and 5 Duer, 681.

¹ *Gridley vs. McCumber*, 5 Howard, 414; *Cheney vs. Garbutt*, *ibid.* 407; *Corwin vs. Freeland*, 6 *ibid.* 241; *Squire vs. Flynn*, 8 *ibid.* 169; *Masten vs. Scovell*, 6 *ibid.* 315.

The subject was carefully examined, by Chief Justice Bosworth, of the Superior Court of New York, in *Hardenburgh vs. Morgan* (18 Howard's Rep. 469), and his conclusions were approved, upon consultation, by all his brethren.

There were two motions before the Chief Justice. In the first, the plaintiff moved *ex parte* after judgment on contract, for leave to issue an execution against the person, on affidavits of the debt having been contracted fraudulently. No previous order of arrest had been obtained. It was not shown that the defendant had appeared in the action. The motion was denied. The established practice of a party issuing such execution as he was entitled to, and issuing it at his peril, was referred to. (Graham's Practice, 350-356.) It was not the province of the court to advise the party. As a provisional remedy, the court had of course lost the power to make an order of arrest.

Subsequently the plaintiff issued an execution, and had the defendant arrested. A motion was made to set this aside, and discharge the defendant.

It was held that in an action on a contract, an execution cannot be issued upon a judgment recovered therein, against the person of the defendant, unless an order of arrest had been made before judgment was recovered.

That where the cause of action *per se* gives the right to arrest or imprison, although the question of such liability may be provisionally determined before judgment, yet it is to be absolutely determined by the judgment itself. The existence of the right to hold to bail is determined by the record itself, and in such cases, a *ca. sa.* may be issued, though no order of arrest had been obtained.

If the right to hold to bail, is wholly independent of the cause of action, then, whether the party could have been arrested must be determined before judgment, by an order of arrest not vacated.

The execution was discharged.

There is one point adverted to in the opinion of Justice Hogeboom, in *Humphrey vs. Brown* (17 Howard, 481), not covered by the decision of the Superior Court. Where the complaint does (unnecessarily) contain allegations of the facts which would justify an arrest, and they are extrinsic, and the defendant allows

judgment to go by default, is there such an admission of the fraud as to justify an execution against the person, there having been no order of arrest? The learned judge inclines to think it could not be done. But if it could be, the defendant should be let in to vacate the execution, upon affidavits.

Amendment of 1862.—By an amendment of this section 288, made April, 1862, the following clause is added: "But no execution shall issue against the person of a judgment debtor unless an order of arrest has been served, as in this act provided, or unless the complaint contains a statement of facts showing one or more of the causes of arrest required by section 179."

The time of service prescribed by the amendment of section 183, is before the docketing of any judgment against the defendant. And thus, it seems, execution against person can only issue—first, where an order of arrest is obtained before a judgment is docketed; or, second, when the complaint states a cause of arrest under section 179.

If the complaint does contain such a statement, though no order has been obtained, it is presumed, the execution may be issued at the peril of the plaintiff. I am not aware of any decision yet made interpreting the amendment.

CHAPTER II.

CLAIM AND DELIVERY OF PERSONAL PROPERTY.

Section 206.

"Delivery of personal property when it may be claimed.

"The plaintiff, in an action to recover the possession of personal property, may, at the time of issuing the summons, or at any time before answer, claim the immediate delivery of such property, as provided in this chapter."

The provision in the Code of 1848 was the same as the present, except that the clause as to the time was, "at the time of commencing the action." It formed the 181st section. In 1849, it was amended as above, and numbered the 206th section, and has remained since unaltered.

Substitute for replevin.—The provisions of this chapter are declared to be in substitution of the former action of replevin.¹ A brief view of the principles and nature of that action will be found useful.

It was the remedy which the law of England allowed for the wrongful taking of goods. The position that it only lay for an unlawful distress has been shown to be inaccurate.² The object of the action was to obtain restitution of the goods, and damages for the unlawful taking. "It may be defined to be a process to

¹ Roberts *vs.* Randall, 3 Sandf. Supr. Court Rep. 787; Rockwell *vs.* Skinner, 19 Barbour, 481.

² Chitty on Pleadings, 162; Shannon *vs.* Shannon, 1 Sch. & Sefr. 327; Rogers & Arnold, 12 Wendell, 32.

regain the possession of goods which have been unlawfully distrained or taken.”¹

But the most usual office of the writ in former periods was in cases of distress for rent. When a party distrained upon would dispute the legality of the distress, he had no other process by the common law than the writ *replegiare facias*, issuing out of the writ office of chancery.² It was termed a writ to take back the pledge, the party taking them holding the goods until the question of right was settled, in the nature of a pledge.³ The statute of Westminster, 3 cap. 21, called the statute of Marlbridge, directed that the sheriff should proceed without writ to replevy the goods; and under the statute of Westminster 2d (13 Ed. I., cap. 13) the party replevyng was to put in pledges to prosecute his action, and also pledges *de retorno*, that if the right was determined against him he would return the distress. The statute 2 Geo. II., cap. 19, consolidated these provisions and enacted some others.

The sheriff, on receiving the security directed, was to cause the chattels taken in distress to be returned into the possession of the party distrained upon, unless the distrainor claimed a property in them. If he had thus obtained possession of his own goods, the party replevyng was driven to the writ *de proprietate probanda*, in which the sheriff was to try, by an inquest, in whom the right of property existed prior to the distress. If the property was found to be in the distrainor, the sheriff could proceed no further, but returned the claim of property to the Court of King's Bench or Common Pleas to be there prosecuted and determined.

If no claim of property was put in, or if, upon trial, the sheriff's inquest determined against the distrainor, then the sheriff was to replevy the goods. They were delivered back to the party replevyng, who was then bound to bring his action of replevy. The distrainor thus became the defendant in the suit, and made the *avowry*, setting up his right to the goods distrained.⁴ It is needless to advert to the other pleadings and

¹ Swift's Digest, vol. 1, page 532.

² Fitzherbert Nat. Brev. 68; Wilkinson on Replevin, p. 6.

³ Ibid. p. 1.

⁴ 3 Black. Comm. 148; Wilkinson on Replevin, *passim*.

proceedings under the old English system. The statute of George II. was in terms confined to replevin, where there was a distress for rent.

The provisions of the ancient English statutes, with those of later date, were adopted nearly in the same language in our statute of the 6th of February, 1788. (1 Revised Laws, 1813, p. 91.)

The Revised Statutes of 1830 (vol. 2, p. 522) adopted a comprehensive system of regulations. The first section was, that whenever goods or chattels shall have been wrongfully distrained, or otherwise wrongfully taken, or shall be wrongfully detained, an action of replevin may be brought for the recovery thereof, and for recovery of the damages sustained by reason of such unjust caption or detention, except in the cases thereafter specified. The excepted cases are those of a seizure for taxes, &c., or under an execution, as provided in section 5.

As the rule is laid down, that the former regulations as to the writ of replevin are to govern, where the Code is not explicit, various of the provisions of the Revised Statutes are adverted to, as well for illustration as in cases omitted in the Code.¹

Object of the action.—The present section of the Code authorizes this provisional remedy only, when the action is one for the recovery of personal property. It contemplates that this recovery is the object of the suit, not damages for the taking or detention; though, by force of other sections of the Code, a judgment for the value may, under certain circumstances, be had. What determines the character of the action, and hence the right to this remedy, is chiefly the judgment prayed for.

Mr. Justice Sill, in *Spalding vs. Spalding* (3 Howard's Pr. Rep. 297), says: "The Code classifies actions. Actions for injuries by force, to property, are put in the second class; and claims to recover the possession of personal property are put in the sixth class." These actions are what were formerly known by the respective names of trespass and replevin. *Trespass de bonis asportatis* and replevin, under the present, as well as the former, practice, are concurrent actions—the same state of facts sustain-

¹ *Wilson vs. Wheeler*, 1 Code Rep. N. S. 402; *Brackway vs. Burnah*, 16 Barbour, 309-314.

² This was under section 143 of the Code of 1848. The classification is now subdivisions 3 and 6 of section 167.

ing the action in either form. In this case, the statement of facts in the complaint is adapted to a suit in either class; and it is the judgment asked for that determines to which it belongs." The complaint prayed for damages for property taken, not for its return.

So, in *Savage vs. Perkins* (11 Howard's Pr. Rep. 17), the court declares, that this action can be brought in the cases where replevin would lie under the Revised Statutes. Such an action was based upon a wrongful detention of the property, which must exist at the commencement of the action. The object of the actions of trespass and trover, before the Code, was, and of the corresponding actions, since the Code, is, the recovery of pecuniary damages, and not of property in specie.

It is true that, in actions of the latter class, damages are recovered for the wrongful detention, but such damages are merely incidental to the action.

In *Fitzhugh vs. Wiman* (5 Selden 559), and *Dwight vs. Enos* (ibid. 470), the 277th and 289th sections of the Code were examined and explained; and it was decided, in the first case, that in an action to recover possession of personal property, when the property has not been delivered to the plaintiffs prior to the trial, the plaintiffs recovering have not a right to elect to take judgment for the value of the property, but are entitled only to a judgment in the alternative, that they recover possession of the property, or the value thereof, in case a delivery cannot be had, together with damages for the detention thereof. And in the latter case it was held, that where the defendant succeeded in the action, and the property had been delivered to the plaintiff, the judgment must also be for the return of the property, and for the value as assessed, only in case a return cannot be had. The election given in the Revised Statutes, to take a judgment for either a return, or for the value, did not exist under the Code.

In *Seymour vs. Vanburen* (13 Howard, 94), the rule in *Spalding vs. Spalding* was recognized. The complaint alleged a cause of action by reason of an unlawful taking a horse and converting it to the defendant's use, and asked judgment for \$1,500 as damages. It was held, on a motion to set aside the proceedings, that the requisition to the sheriff to take and deliver the horse was wholly unwarranted. The nature of the action was deter-

mined by the complaint, and it was for damages, not for the specific property.

What property.—The section covers all personal property. By section 463, personal property includes money, goods, chattels, things in action, and evidences of debt.

It has been held, in England, that growing crops may be considered in the nature of goods and chattels, being distrainable under 11 Geo. II., cap 19.¹

Replevin could not be sustained for taking and removing things affixed to the freehold, though wrongfully separated therefrom by the defendant.

In *Niblet vs. Smith* (4 T. Rep. 504), this general rule was recognized in relation to things which might be distrained; and replevin was at first used to try the legality of a distress.

In *Cressen vs. Stont* (17 John. Rep. 116), it was held, that though replevin would not lie for things fixed to the freehold, yet if, after the sheriff had levied on them, they are severed, they become personal property, and might be replevied.

A warehouse entry, if evidence of the title of its possessor to the goods which it describes, is as properly the subject of an action for its delivery as a certificate of stock or bill of exchange.

This was so held in *Knehue vs. Williams* (1 Duer, 598), where a document entitled a warehouse entry, purporting to be an entry at the custom-house of certain merchandise imported by the plaintiffs, but not signed by any officer of the customs, was the subject of the action.

It did not appear on its face to be of any value; yet it was sworn to be so in the affidavit, and it might turn out, in connection with evidence given on the trial, to be of value. It was settled, that a bill of exchange, bill of lading, and certificate of stock might be replevied; and between them and an entry, which is a transferable evidence of title, no tangible distinction could be stated.

Under some circumstances, replevin will lie for property improperly confounded with property of the other party, and the whole will be taken.

The true principle is perhaps accurately stated in *Wingate vs. Smith* (20 Maine Rep. 287): "The mere taking by one man of

¹ 7 Moore's Rep. 231; *Glover vs. Coles*, 1 Bingham, 6.

the mill-logs of another, and mixing them with his own, will not constitute confusion of goods; but if he fraudulently take the logs and manufacture them into boards, and intermixes these boards with a pile of his own, so that they cannot be distinguished, and with a fraudulent intent, the owner may maintain replevin for the whole pile of boards."

This subject of the confusion of goods was entered into fully in the cases of *Willard vs. Rice*, 11 Metcalf, 493; *Ryder vs. Hathaway*, 21 Pickering, 248; *Snyder vs. Vaux*, 2 Rawle Penn. Rep. 423; *Silisbury vs. McCoon*, 3 Comstock Rep. 379; *Wilson vs. Nason*, 4 Bosworth, 155, Superior Court, General Term.

Time for allowing the remedy.—The plaintiff may have this provisional remedy at the time of issuing the summons, or at any subsequent time before answer.

The phrase, *at the time of issuing the summons*, is also used, in the 227th section, as to an attachment. The question of its meaning is discussed under that section. It is presumed to be the preparation of the summons under sections 128 and 129, and its delivery to some one, to have it served, under section 133. The delivery of the summons and requisition to the sheriff may be contemporaneous acts.

If, before action brought, the defendant offer unconditionally to restore the property, the proceedings will be stayed.

In *Savage vs. Perkins* (11 Howard, 17), Justice Bowen said: "The object of this action is the recovery of the property in specie; and if, before suit brought, the defendant offer unconditionally to restore it, the object is already attained, and the suit is wholly unnecessary. Such offer is equivalent to a tender before suit. The plaintiff could still have recovered the damages sustained, if any, by reason of the refusal to deliver it when demanded, by an action corresponding with the former action of trover, or, as denominated by the Code (§ 167), an action for injury to property."

Section 207.*“Affidavit, and its requisites.*

“Where a delivery is claimed, an affidavit must be made by the plaintiff, or by some one in his behalf, showing—

“1st. That the plaintiff is the owner of the property claimed (particularly describing it), or is lawfully entitled to the possession thereof by virtue of a special property therein, the facts in respect to which shall be set forth ;

“2d. That the property is wrongfully detained by the defendant ;

“3d. The alleged cause of the detention thereof, according to his best knowledge, information, and belief ;

“4th. That the same has not been taken for a tax, assessment, or fine, pursuant to statute ; or seized under an execution or attachment against the property of the plaintiff ; or if so seized, that it is by statute exempt from such seizure ; and—

“5th. The actual value of the property.”

The Code of 1848 was, in all respects, the same.

Ownership to be stated.—If the affidavit states explicitly and positively that the plaintiff is the owner of the property, it will be sufficient, without stating the title or facts proving ownership.

Thus, in *Vanderbergh vs. Vankelbergh* (8 Barbour, 217), it was held that a declaration in replevin must allege that the property was the property of the plaintiff ; an allegation that the plaintiff was entitled to the possession thereof, was insufficient.

In analogy to this rule, it was decided, in *Burns vs. Robins* (1 Code Rep. 62), that the averment of ownership in the affidavit must be express ; but if express of absolute ownership, it would be enough.

But, where the plaintiff swore that he was entitled, as against his copartner, to the exclusive possession of the property claimed, by virtue of the articles of copartnership, it was held that the affidavit was not sufficient. Hoffman, Justice, said : “ The facts should be shown, so as to enable the court to say that upon them, and on the best apparent evidence of them, a special property

and right of possession are made out. If the evidence consists in a writing, that must be set forth. No statement of its contents or import will suffice. (*Depew vs. Leal*, Superior Court, Gen. Term, 2 Abbott, 136.)

The difference between these decisions arises from the varied phraseology of the Code. The facts are only to be set forth when the claim is made on the basis of a special property in the goods.

The Revised Statutes of 1830 prescribed that the affidavit should set forth an ownership, or that the claimant was then lawfully entitled to the possession of the goods. The clause, *by virtue of a special property therein*, was not in the statute.

In *McCurdy vs. Brown* (1 Duer, 101), the court recognized the view that the action for the recovery of personal property was substantially the old action of replevin. The plaintiff must show a legal title—an absolute or a special property—giving him an immediate right to the possession. It was held that a person who advanced money on the faith that the proceeds of goods remaining in the possession of the owner should be applied to his reimbursement, though he obtained an equitable interest, had not such a legal title to the possession of the goods as entitled him to sustain this action under the Code.

In *Fitzhugh vs. Wiman* (5 Selden, 559), forwarding merchants had made advances for charges on goods consigned to them, to be transported and delivered to ultimate consignees or owners. The former were held to have such an interest as entitled them to sustain this action against a third person, to whom the goods had been wrongfully delivered by the carrier. The delivery to the carrier, under a special consignment to the forwarders, was a virtual delivery to the latter.

In *Powell vs. Bradlee* (9 Gill. & John. 220), it was held that a party to whom property is to be delivered by the terms of a bill of lading, could sustain replevin.

In *Galloway vs. Bird* (4 Bingham, 299), the action was for taking and unjustly detaining the plaintiff's goods. Avowry that the defendants were carriers and lightermen; that one Baelhe was the consignor, and the plaintiff the consignee, of the goods, which were delivered to the defendants, and came to their hands as such carriers, to be carried to the plaintiff, for reward, payable

by the said Bache; that the defendants detained the goods by virtue of a lien for a balance of account due them by Bache.

Best, Ch. Justice: "The goods which were replevied had been delivered to the avowants upon a contract. The authorities all lay it down that replevin can only be maintained where goods are *taken*, not where they are delivered upon a contract; and this is clear, also, upon the form of pleading, which is, that the defendant took and detained the goods; the plea to which allegation is *non cepit*. No instance can be found in the Digests or Abridgements of replevin having been brought upon a delivery under a contract."

The sufficient statement of an absolute ownership dispenses with the necessity of stating any thing as to possession, or a right to the possession; because it is a rule of law, that the general property of personal chattels creates a constructive possession.¹

Description of property.—The property is to be particularly described in the affidavit. The same was the rule under the writ of the former practice.

Where the writ was to deliver to the plaintiff about 400 tons of bog ore, it was held that the sheriff would have been justified in refusing to execute the writ thus vaguely describing the property.²

In *Pope vs. Talman* (7 Taunton, 642), it was decided that a declaration in replevin for taking divers goods and chattels of the plaintiff was bad for uncertainty.

The place of taking should be also stated with particularity.

In *Potter vs. Bradley* (2 Moore & Payne, 78), the declaration alleged that the defendant, in the parish of A, in the county of Kent, in a certain close there, took the plaintiff's cattle; held, that the close should have been described by name, or by abutments when it had no name, or as being in the occupation of A. B. This was on demurrer.

An insufficient description of the goods taken, or of the *locus in quo*, is cured by the defendants avowing or making cognizance, now by his answer.³

¹ *Smith vs. James*, 7 Cowen, 321; *Duncan vs. Shear*, 11 Wendell, 54.

² *De Witt vs. Morris*, 13 Wendell, 496.

³ *Banks vs. Angell*, 7 Adol. & Ellis, 843.

Under the statute "Of the action of Replevin" (2 R. S. 523, § 36), the declaration was to contain allegations with requisite certainty of time, place, and value. But, by section 37, it was not necessary to state a place certain within the town or village as that where the property was taken, except in the case of goods distrained.

Averment of wrongful detention.—The allegation that the property is wrongfully detained by the defendant is essential, and must be explicit. It seems that if the allegation is positive it may be in the general language of the section.

The action itself, to recover possession of personal property, clearly embraces what was before replevin in the *cepit*, replevin in the *detinet*, and both. The Revised Statutes allowed the action for either the tortious taking, or the tortious detention. Justice Harris, in his elaborate opinion in *Brockway vs. Burnap* (16 Barbour, 309), says: "It is clear to my mind, that replevin, as extended by the Revised Statutes, did, as a general rule, perhaps not invariably, extend to those cases in which replevin, detinue, trespass, or trover, was the remedy at common law."

But even if the action under the 206th section of the Code may be sustained upon the allegation merely of ownership, or special property, and of an unlawful taking, it is clear that the requisition to the sheriff which will warrant the delivery to the plaintiff of the property, to hold during the suit, can only be had when the detention is wrongful.

Possession by defendant.—It has been held in some cases, that it is essential to support the action, that the defendant should have possession of the property, or control over it in fact or in law.

Thus, in *Roberts vs. Randall* (3 Sandf. Supr. Ct. Rep. 707), it was decided, that before the Revised Statutes the action of replevin was purely possessory, and could not be maintained against a party who had divested himself of the goods claimed, except where a distrainer for rent proceeded fraudulently, or in violation of the statute regulating distresses; that under such statutes replevin would not be sustained against a party who had neither possession nor control of the chattels claimed, and had not parted with them in fraud of the action; and that the action under the

Code was a substitute for replevin, and governed by the same rules.

A similar view was taken in *Elwood vs. Smith*. (9 Howard, 528.)

And in *Reimer vs. Nagle* (1 E. D. Smith, 256), the court say: "The object of the action, the characteristic which distinguishes it from an action for damages, is this, that it restores the goods to the possession of the party entitled. I can never believe that the Legislature intended to apply it to a case where the restoration was confessedly impossible. The Legislature meant to apply it to a case of actual detention by the defendant, and not to a fictitious or constructive one."

But, in *Brockway vs. Burnap* (16 Barbour, 313), it was held that an action to recover possession of personal property would lie, notwithstanding the defendant had parted with the possession before the suit was commenced. It was considered that such was the rule under the Revised Statutes. The defendant might have been arrested, if the sheriff could not make delivery of the property, and yet the action proceeded for the property or the value. Replevin would always lie for goods unlawfully taken. Wherever trespass would lie, the injured party might sustain replevin. There was nothing in the Code that prevented the present remedy by an action to recover personal property being as full, general, and complete, as that action was under the Revised Statutes.

Drake vs. Wakefield (11 Howard Pr. Rep. 106), *Savage vs. Perkins* (ibid. 17), and *Van Neste vs. Conover* (20 Barbour, 547), are to the same effect.

Cause of detention to be stated.—So far as the plaintiff possesses any knowledge of the grounds upon which the defendant claims to detain the goods, he must set it forth in the affidavit.

The affidavit must also show that the property has not been taken for tax, assessment, or fine, pursuant to a statute.

The provision of the Revised Statutes was, "No replevin shall lie for any property taken by virtue of any warrant for the collection of any tax, assessment, or fine, in pursuance of any statute of this State." (2 R. S. 522, § 4.)

It was held, under this provision, that an action would not lie, where a warrant for the collection of a military fine appeared

on its face to give authority to the officer, although it may have issued erroneously or irregularly. (*The People vs. The Albany Com. Pleas*, 7 Wendell, 485.)

It was held, under a similar statute in New Hampshire, that when the defendant avowed the taking as collector of taxes, under several warrants, some of which were legal and others illegal, his avowry was in the nature of a declaration, and entitled him to judgment for a return. (*Brachett vs. Whidden*, 3 N. H. Rep. 17.)

The affidavit must also state that the property has not been seized under an execution or attachment, against the property of the plaintiff; or if so seized, that it is by statute exempt from such seizure.

Chattels in the custody of the law cannot at common law be replevied; goods taken in execution, and, by parity of reasoning, goods attached by original writ, as security for the judgment, cannot be replevied.¹

In *Mills vs. Martin* (19 John. Rep. 31), Spencer, Chief Justice, said: "It is objected, that it has been decided in this court, that replevin will not lie for goods taken by an officer on a writ of execution, whilst in the possession of the person against whom the execution has issued. This has been so decided in *Thompson vs. Britton* (14 Johns. Rep. 86), and *Gardner vs. Campbell* (15 Johns. Rep. 401); and I think those cases were decided in consonance with sound principles. If it had appeared that the executions were issued upon judgments illegal and void, most certainly the conclusion would have been different."

But this rule appears to have applied only to the case of an action by the defendant in the execution. A stranger might have replevied goods so taken.²

By the Revised Statutes (2 R. S. 522, § 5), no replevin would lie at the suit of the defendant in any execution or attachment to recover goods or chattels seized by virtue thereof, unless such goods and chattels are exempted by law from such execution or attachment; nor shall replevin lie for such goods or chattels at the suit of any other person, unless he shall at the time have a right to reduce into possession the goods taken.³

¹ Per Shaw, Ch. J., in *Isley vs. Stubbs*, 5 Mass. 280.

² *Clark vs. Skinner*, 20 John. Rep. 467. See 3 Wendell, 280.

³ *Fairfield*, 51; 9 Cowen, 259.

The revisers proposed a section which went far to abolish any right in a third person to bring replevin for goods seized. They say, "The provisions by which the owner of any property seized in execution may have his right tried by the sheriff and a jury, seem sufficient for his protection, without resorting to the action of replevin."

This would appear to be the design of the Code in the adoption of section 216. See that section, *post*, and the cases under it.

In *Spalding vs. Spalding* (3 Howard Pr. Rep. 297), it was held by Sill, Justice, when the property of the plaintiff was taken under an execution against him, that an affidavit stating generally that the property was exempt from execution, was not sufficient. The facts showing such exemption should be stated.

In *Roberts vs. Willard* (1 Code Reporter, 100), the court said, that the allegation of the property being exempt from execution, will be sufficient in general language, if positively made, but not if made on belief, without stating the advice of counsel, on a full presentation of the facts.

Actual value to be stated.—The actual value of the property must be stated in the affidavit.

The declaration, under the Revised Statutes, was to set out the value with requisite certainty (2 R. S. 528, § 10); the bond, the pre-requisite for the execution of the writ, was to be in double the value of the property specified in the writ, which value shall be ascertained by the oath of one or more disinterested witnesses, to be sworn and examined by the sheriff. (*Ibid.* 523, § 7.)

Amending affidavit, &c.—The court, on a motion to set aside the proceedings, may give the plaintiff leave to amend his affidavit, or furnish new affidavits.

This point has been decided differently in some cases, but the weight of authority seems to be in favor of the proposition.

In *Depew vs. Leal* (Gen. Term Supr. Ct., 2 Abbott, 131), the court say: "We have examined the cases referred to upon the right of the court to allow an amendment of, or an addition to, the affidavit in such a case. (*Spalding vs. Spalding*, 3 Howard Pr. Rep. 297; *Stacy vs. Farnham*, 2 *ibid.* 26; *Cutter vs. Rathbone*, 1 Hill, 204; *Hamsley vs. Bates*, 19 Wendell, 632.) We are satisfied that the court has such a power, and also that the proposed additional affidavit may be used in opposing the motion to

set aside the proceedings. (Chickman vs. Chickman, 3 Howard, 365.) This power may be properly exercised in a case where what is to be supplied is an instrument referred to in the original affidavit, and matter merely explanatory of the facts therein stated, introducing no new substantive matter."

Section 208.

"Requisition to take and deliver the property.

"The plaintiff may thereupon, by an indorsement in writing upon the affidavit, require the sheriff of the county where the property claimed may be, to take the same from the defendant, and deliver it to the plaintiff."

This section has not been changed since the enactment in 1848.

This written requisition is the substitute for the writ directed to the sheriff, the form of which was given in the Revised Statutes of 1830. (2 R. S. 523, § 6.) The sheriff was commanded "that if the said A. B. shall give you security as required by law, to prosecute his said complaint, and to return the aforesaid goods and chattels, if return thereof shall be adjudged, and to pay all such sums of money as may be recovered against him hereupon; that you cause the same goods and chattels to be replevied and delivered to the said A. B. without delay; and also that you summon the said C. D. to appear before our justices at, &c. And in case you cannot find the aforesaid goods and chattels within your county, so as to replevy the same, as you are above commanded, then we further command you, that you take the body of the said C. D., and that you have him before our said parties at the place and on the day before mentioned, to answer the said A. B. in the premises."

This last clause of the writ was warranted by the eleventh section of the statute, which provided that "if the property described in the writ has been removed or concealed, so that the sheriff cannot make delivery thereof, he shall arrest the body of the defendant and keep him in his custody, in the same manner as on a

capias ad respondendum in a personal action, until he shall execute a bond as prescribed in the next section, or be otherwise legally discharged."

It has been decided that a plaintiff cannot have a delivery of the property under the provisions of the Code, where he has arrested the defendant under subdivision 3 of section 179.

Thus, in *Chappel vs. Skinner* (6 Howard, 338), an order of arrest was obtained on the 8th of October, 1851, upon an affidavit of ownership of personal property, and that it was wrongfully detained by the defendant upon certain pretences specified. It contained the allegations necessary, under section 207, to entitle the plaintiff to an immediate delivery, and it stated also that the defendant had elandestinely taken the property away and concealed it, so that it could not be found by the sheriff. On the 15th of October, the plaintiff made another affidavit similar to the first, except as to the defendant's elandestinely removing the property; gave the undertaking under section 209, and made the requisition under section 208; upon which the property was taken and delivered to the plaintiff.

A motion to vacate the second affidavit, undertaking, and requisition, and to restore possession to the defendant, was granted.

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Section 209.

"Security on the part of the plaintiff, and justification.

"Upon the receipt of the affidavit and notice, with a written undertaking executed by one or more sufficient sureties approved by the sheriff, to the effect that they are bound in double the value of the property as stated in the affidavit, for the prosecution of the action—for the return of the property to the defendant, if return thereof be adjudged—and for the payment to him of such sum as may, for any cause, be recovered against the plaintiff, the sheriff shall forthwith take the property described in the affidavit, if it be in the possession of the defendant or his agent, and retain it in his custody. He shall also without delay serve on the defendant a copy of the affidavit, notice, and under-

taking, by delivering the same to him personally, if he can be found, or to his agent from whose possession the property is taken; or, if neither can be found, by leaving them at the usual place of abode of either, with some person of suitable age and discretion."

By the Code of 1848, a notice was to be added, that the sureties would justify before a judge of the court, or county judge, at a time and place therein named, not less than four, nor more than eight days thereafter. This was omitted in 1849, and the section has remained unchanged since.

The undertaking.—The undertaking is for the prosecution of the action, and also for the return of the property to the defendant, if the return be adjudged. This answers to the two original separate pledges—the one at common law *de prosequendo* to answer to the King *pro falso clamore*; and the other, *pro retorno habendo*, under the statute of Westminster, 2 cap. 2.¹

Under the statute 11 Geo. II., cap. 19, one bond was sufficient, from the plaintiff and two responsible persons as sureties, conditioned for prosecuting the suit with effect and without delay, and for duly returning the goods and chattels distrained, in case a return shall be awarded.

By the act of 1813 (1 R. S. 92, § 4), the sheriff, before he made deliverance of any goods, &c., was to take of the plaintiff sufficient security to prosecute the suit, and to return the said goods, &c., if return thereof shall be adjudged; and if such sheriff shall take security otherwise, or neglect to take such security, he shall answer for the price or value of such goods, &c.

By the Revised Statutes of 1830 (2 R. S. 523, § 7) the writ was not to be executed unless (among other things) the plaintiff, or some one in his behalf, should execute a bond to the sheriff, or the officer to whom the writ is directed, with the addition of his name of office, with sufficient sureties to be approved by such sheriff, in a penalty at least double the value of the property specified in the writ. The condition of the bond to be, that the plaintiff should prosecute the suit to effect and without delay, and will return the same property, if return thereof be awarded.

The sheriff is to judge whether one or more sureties must be

¹ Wilkinson on Replevin, p. 11, Law Library, vol. 6.

given. A plaintiff cannot be a surety with another person. But the court will allow an amendment.¹

An unexcused delay in the prosecution of the action, is as much a breach of the condition of the bond, as a judgment of return. This was held under the statute of Westminster, and a similar rule prevailed under that of Geo. II.

Where the action was stayed by injunction, during which time the plaintiff in replevin died, so that there was neither nonsuit nor verdict, it was held that he had prosecuted his suit with effect.²

In *Oxford vs. Parrett* (4 Bingham, 586), it was held that the delay of two years in the proceedings was a breach of the condition of the bond to prosecute without delay.

In *Harrison vs. Wardle* (5 Barn. & Adol. 146), it was decided that a breach of the condition to prosecute without delay might exist without the suit having proceeded to judgment for the defendants, and while it was continuing. The party, however, was not responsible for a delay which arose from the neglect of the sheriff.

In *Whaling vs. Shales* (20 Wendell, 673), it was held that the proceedings were irregular and could be set aside on motion, where the bond was executed by one surety only (18 Wendell, 581, and 19 *ibid.* 632). The proceedings were ordered to be set aside, unless the plaintiff executed a sufficient bond *nunc pro tunc*, and the sureties justified.

The case from 18 Wendell (*Wilson vs. Williams*) is stated at length, *post*, section 210; and *Kesler vs. Haynes* (6 Wendell, 547) is overruled.

By section 423 of the Code, the undertaking provided for by the chapter on the claim and delivery of personal property, shall, after the justification of the sureties, be delivered by the sheriff to the parties respectively for whose benefit it is taken.

And the defendants, being then the actual parties in interest, may prosecute the undertaking in their own names.

Action on the undertaking.—It is not necessary in an action on the undertaking to allege or prove the regularity of the proceed-

¹ *Burns vs. Robbins*, 1 Code Reporter, 62.

² *Carthews Rep.* 519; 12 Mod. 380; *Wilkinson on Replevin*, 113.

ings in the replevin suit. (Slack *vs.* Heath, 4 E. D. Smith, 95.) Nor to state the issuing of an execution against the property, and its return unsatisfied. The parties are bound absolutely for payment, and must see that such payment is made. (Ibid.)

Costs.—When a third person had executed the undertaking on behalf of the plaintiff, and the defendant obtained a judgment against him for costs, which judgment was on appeal affirmed with costs, the obligor was held responsible for both bills, in an action on the undertaking. (Tibbles *vs.* O'Conner, 28 Barbour, 538.)

Delivery or retention of property.—Under the statute, upon receipt of the writ, affidavit, and bond, the sheriff was to deliver possession of the property to the plaintiff or his authorized agent. (2 R. S. 523, § 8.) Under this section of the Code he is to retain it until the defendant exercises his right of exception to the sureties, under section 210, or reclaims the property under section 211. For either of these proceedings he is allowed three days after service of the affidavit and notice. The excepting to the sureties waives the right to reclaim.

Thus, in *Graham vs. Wells, sheriff, &c.* (18 Howard Rep. 376), the action was to recover a store of goods, which the defendant had taken, by virtue of an attachment against one Canavan. On the day of the commencement of the present action, the coroner took the goods, and, on the 16th of October, the defendant delivered to him an undertaking, conforming to the requirement of the 211th section. Harris, justice, said: "Upon the commencement of an action for the recovery of personal property, the defendant has a right to elect, whether the plaintiff or himself shall hold the property *pendente lite*. Three days are allowed him within which to make his election. He may, within three days, except to the sufficiency of the plaintiff's sureties (under section 210). His exception is of itself evidence of his election not to hold the property himself. During the three days thus allowed to the defendant, within which he may make his election, the officer is required to retain the property in his possession. If the defendant elect to hold it, the officer is still to retain the property until the sureties justify, unless, indeed, he is willing himself to take the risk of such justification.

"The effect of a demand by the defendant is not to entitle him

to a return, but only to prevent a delivery to the plaintiff. To obtain a return, his sureties must be given and justify under section 211. The plaintiff has for his security the liability of the sheriff until such justification, and the undertaking afterwards."

The undertaking under this section is to be, as before stated, similar to the bond under the Revised Statutes.

The case of *Decker vs. Judson* (16 N. Y. Rep. 439, in the Court of Appeals) settled some important points connected with such a bond. The plaintiffs, in an action of replevin, had given the usual bond to the sheriff under the Revised Statutes. They were required, as a condition for postponing the trial, to renew their sureties on such bond, or that such sureties should justify. Judson, the appellant, signed the bond, beneath the names of the other obligors, without the knowledge or assent of the previous sureties. There was a judgment for defendant for the value of the property, and execution returned unsatisfied. The bond was assigned to Decker, the defendant, in the original suit, and the present action was brought upon it.

"The right to take a bond or other security in the name of an agent or trustee, for the benefit of the principal or *cestui que trust*, is unquestionable. The Code sanctions this principle (§ 113). The execution of the bond estopped Judson from denying the recitals in it, which imported that it was executed upon the institution of the replevin suit, and taken by the sheriff at a time when it was lawful and proper to take the same. A replevin bond may be amended after the service of the process, and, consequently, after the time for taking an original bond had gone by.

"After the plaintiff has obtained possession of the property in dispute, by acting on the bond as a lawful and valid security, neither he nor his surety ought to be permitted to get rid of it by alleging that it is not so strong or so perfect as the defendant might have required him to make it." (Ruggles, J., in *Shaw vs. Tobias*, 3 Comstock, 142.)

Section 210.*“Exception to sureties.*

“The defendant may, within three days after the service of a copy of the affidavit and undertaking, give notice to the sheriff that he excepts to the sufficiency of the sureties. If he fail to do so, he shall be deemed to have waived all objection to them. When the defendant excepts, the sureties shall justify on notice, in like manner as upon bail on arrest. And the sheriff shall be responsible for the sufficiency of the sureties, until the objection to them is either waived, as above provided, or until they shall justify, or new sureties shall be substituted and justify. If the defendant except to the sureties, he cannot reclaim the property as provided in the next section.”

This section was not in the Code of 1848. It was adopted in 1849, and has remained unchanged since.

The three days enables the defendant to determine, whether the plaintiff or himself shall hold the property during the action. The sheriff remains responsible until the end of the three days, or until justification, if bail is excepted to. (*Graham vs. Wells*, 18 Howard, 376, stated *supra*.)

It was held, in *Manley vs. Patterson* (3 Code Rep. 89), that where the defendant had excepted to sureties in an undertaking given under section 209, and they had omitted to justify, the defendant could not move that the action be discontinued. The defendant has the sheriff's responsibility to look to, who has discretion in approving the sureties. The plaintiff's proceedings in the action cannot be affected.

In *Cobb vs. Lachey* (6 Duer, 649), it was ruled that, where the defendant excepts to the sureties in the plaintiff's undertaking, if one fails to justify, and for that reason a new surety is substituted, a new undertaking must be executed. The original undertaking cannot be altered by inserting therein the name of the new surety, and by the latter signing it, without the consent of the other surety, and of those for whose benefit or protection it is required to be given.

The Code makes the sheriff absolutely responsible for the sufficiency of the sureties until the period for excepting expires, or until justification.

In this particular, it declares a rule somewhat different from that in England under the statute of 2 Geo. II., cap. 19, § 23 :— The provisions of that statute were much like those of our Revised Statutes, and of the 209th section of the Code. In various cases it has been held that the sheriff does not warrant the sufficiency of the sureties in the bond. He is bound to exercise a reasonable discretion in regard to them, and it is for the jury to decide whether that discretion has been properly used or not.¹

In *Armstrong vs. Burrell* (12 Wendell, 302), Nelson, justice, said : The bond in this case was taken by the sheriff under the 4th section of the statute (1st R. L. 92), which is a copy of the 13th Ed. 1, c. 2, and is not assignable to the defendants in the replevin suit. Such bond is taken for the indemnity of the sheriff, and at his peril ; for, if he neglects to take it, or takes insufficient pledges or bail, he becomes personally responsible for a return of the goods replevied, in case a return is awarded by the court. (*House vs. Patterson*, 2 Saunders, 195, note 36.) This bond had, by the practice latterly, become the subject of an action on the case in behalf of the sheriff. It enured for the benefit of the parties defendant in the replevin suit. The sheriff had a right to institute a suit without their consent, and they could not release the bond after such suit commenced, without regard to his interest in the costs. The proper course was by motion, when the rights of all parties would be regarded.

By the 64th section of the Revised Statutes of 1830 (2 R. S. 533), upon the return of an execution unsatisfied, the defendant, or his representatives, could have an action on the bond executed by the plaintiff and his sureties, to recover the value of the property replevied, and the damages, &c., and such bond shall be assigned to such defendant, or his representatives, on their request.

The contents of the bond (under sub. 2 of section 7, p. 523) are before stated. (*Ante*, p. 119.)

The case of *Wilson vs. Williams* (18 Wendell, 581), explains

¹ *Hinale vs. Blades*, 5 Taunton, 225 ; *Scott vs. Waittman*, 3 Starkie, 168 ; *Jefferey vs. Bastard*, 4 Adol. & Ellis, 823 ; *Plumer vs. Brisco*, 11 Q. B. Rep. 46.

the liability of the sheriff under the Revised Statutes. It was held, that the bond was as essential to the regularity of the writ as the affidavit. The language was: "Such writ shall not be executed, in any case, unless the following provisions are complied with," &c.

Under the old statute (1 R. S. 92, §§ 4, 8), whether a bond was taken or not—and, when taken, if the sureties were sufficient or not—the proceedings upon the replevin were regular, and the only consequence was, the liability of the sheriff to the defendant for the damages sustained by reason of such omission or defect.

The Statutes of Westminster, 2, and of 2 Geo. II. are adverted to, and the court proceed: "The sheriff is himself responsible to the party injured for the insufficient security, under either statute in England, or under either section of our former statute. Even after an assignment of the bond and suit, the action might have been brought against the sheriff, as the assignment is no waiver of proceedings against him. (1 Saund. 145, N. 3, *f*.)

"The defendant now being at liberty to except to the sureties, and special care taken that he shall be enabled to do so, we think that this officer is no longer responsible as before. As the defendant has now control of the matter, there would seem to be no longer any necessity or propriety for making the sheriff amenable to him. Indeed, §§ 32 and 33 (2 R. S. 527) are conclusive upon the point. If no exception shall have been entered to the sureties in the bond, &c., the sheriff shall be discharged from all liability for the sufficiency of such sureties. If such exception shall have been made, and judgment of discontinuance shall be rendered against the plaintiff for his sureties not justifying (§ 30), the sheriff shall be liable to the defendant for the sufficiency of such sureties as now provided by law. (§ 32.)"

The 28th, 29th, 30th, 31st, 32d, and 33d sections of the statute provided for the course upon exceptions, justification, exoneration of the sheriff, &c.

Substantially, the principles of these regulations are retained in the Code. The defendant must except, or he takes the liability of the parties to the undertaking, and relieves the sheriff. If he does duly except, justification, or new sureties justifying, will also discharge the sheriff. Until the power of excepting expires, or until justification, the sheriff remains responsible.

Section 211.

“Defendant, when entitled to re-delivery.

“At any time before the delivery of the property to the plaintiff, the defendant may, *if he do not except to the sureties of the plaintiff*, require the return thereof, upon giving to the sheriff a written undertaking, executed by two or more sufficient sureties, to the effect that they are bound in double the value of the property, as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, if such delivery be adjudged, and for the payment to him of such sum as may, for any cause, be recovered against the defendant.

“If a return of the property be not so required within three days after the taking and service of notice to the defendant, it shall be delivered to the plaintiff, except as provided in section 216.”

In the Code of 1848 the words above italicized, and the whole of the last paragraph, were not inserted. In 1849 the section was amended, and has remained unaltered since.

In *Hunt vs. Mootry* (10 Howard, 478), it was held, that there was no provision in the Code, nor in any statute, for the restitution of the property to the plaintiff after it was re-delivered to the defendant pursuant to section 211. No further change in the possession seems to be contemplated until judgment shall be rendered. The law gives to the defendant a positive definite right; and the only question is, Can the court, in the exercise of its equity jurisdiction, dispense with this, and allow the plaintiff again to take possession? An ample and minute provision is afforded by the Code for the specific restitution of personal property; and although the defendant is entitled, on giving security, to a re-delivery of the property, the court has the power to restrain the injury or disposition of it. The plaintiff could not have the repossession of the property.

Under the former system, if the goods had once been delivered to the plaintiff in replevin, the defendant could not recover

possession, except upon judgment in his favor. A writ of replevin by him, after one issued against him, would be superseded before return, or quashed after. (*Morris vs. De Witt*, 5 Wendell, 71.)

In *McCann vs. Thompson* (13 Howard, 380), Justice Clerke pointed out the apparent inconsistency between the last and the first clause of this section. Under the first clause, it might be that at any time before actual delivery to the plaintiff, though after the expiration of three days from the notice, the defendant might require a delivery to himself. If the clauses were contradictory, the last would overrule the first. But the construction should be, that at any time before the plaintiff was entitled to the delivery—that is, at any time within the three days—the defendant might require the return.

The undertaking is not void, if made to the plaintiff in the action. (*Slack vs. Heath*, 4 E. D. Smith, 95.)

The sheriff must retain the property in his possession during the three days which the defendant has to elect whether he will require a return or not. If he elect to demand it, the sheriff must still retain possession until the defendant's sureties justify, unless the sheriff is willing to take the risk. The effect of the defendant's demand is not to entitle him to the property, but to prevent a delivery to the plaintiff. (*Graham vs. Wells*, 18 Howard, 376.)

Section 212.

“Justification of defendant's sureties.

“The defendant's sureties, upon a notice to the plaintiff of not less than two, nor more than six days, shall justify before a judge or justice of the peace, in the same manner as upon bail on arrest; upon such justification, the sheriff shall deliver the property to the defendant. The sheriff shall be responsible for the defendant's sureties until they justify, or until justification is completed, or expressly waived, and may retain the property until that time; but if they, or others in their place, fail to justify at the time and place appointed, he shall deliver the property to the plaintiff.”

The Code of 1848 was merely as follows: "The defendant's sureties, upon a notice to the plaintiff of not less than four, nor more than eight days, shall justify before a judge, in the same manner as the sureties given by the plaintiff; and, upon such justification, the sheriff shall deliver the property to the defendant." The amendment was in 1849. The mode of justification is stated *ante*, ch. I., §§ 194, 195. See, also, the next section.

Justice Harris observes in *Graham vs. Wells* (18 Howard, 376), that the time within which the defendant is to proceed to have his sureties justify is not limited, nor need it be. It is enough for the plaintiff that the property is to be retained by the officer until such justification takes place, unless the officer chooses to make himself personally responsible that the sureties shall justify. The plaintiff cannot have the property; and whether it remains in the hands of the officer or of the defendant, does not concern him farther than to know that he has sufficient security for the delivery of the property to him, in case he obtains judgment for such delivery. This security he has in the liability of the officer, until the sureties have completely justified.

Section 213.

"Qualifications and justification of sureties."

"The qualifications of sureties and their justification shall be as prescribed by sections 194 and 195, in respect to bail upon an order of arrest."

See these sections, and the decisions under them, *ante*, pp. 73-78, &c.

In *Graham vs. Wells* (18 Howard, 376), before cited, five sureties had executed the undertaking on the part of the defendant; but three only appeared to justify. They justified in the aggregate to \$60,000. The value of the property, according to the plaintiff's affidavit, was \$22,100. Justice Harris said: "The requirement of the statute is that, where more than two bail are allowed to justify, the whole justification shall be equivalent to that of two sufficient bail. The amount specified in the under-

taking was \$45,000. If there had been but two sureties, they would each have been required to justify in this amount. This would have amounted in the aggregate to \$90,000. A less amount than this was insufficient. Yet sureties have been pronounced sufficient who have only justified to the amount of \$60,000. I regard such a justification as irregular. The application for a stay of proceedings must, therefore, be granted." The application was to prevent the delivery of the property to the defendant. There had been an approval of the undertaking by another judge.

Section 214.

"Property, how taken, when concealed in building or inclosure.

"If the property, or any part thereof, be concealed in a building or inclosure, the sheriff shall publicly demand its delivery. If it be not delivered, he shall cause the building or inclosure to be broken open, and take the property into his possession; and, if necessary, he may call to his aid the power of his county."

This section has remained unchanged since its enactment in 1848.

A similar provision is contained in the Revised Statutes (2 R. S. 524, § 10), and also in the laws of 1813 (1 R. S. 92, § 3). It is derived from the statute Westminster 1, cap. 17, which was enacted to restrain the habit of driving distresses into strongholds, which became, during the wars of the Barons, a source of great oppression. The statute directed that, upon demand and refusal to allow the distress to be delivered, the castle or stronghold should be razed and thrown down.

The sheriff may break open doors to execute a replevin, and call the *posse comitatus* to his assistance.¹

¹ 2 Institutes, 193; 3 Black. Com. 149.

Section 215.

“Property, how kept.”

“When the sheriff shall have taken property as in this chapter provided, he shall keep it in a secure place, and deliver it to the party entitled thereto, upon receiving his lawful fees for taking, and his necessary expenses for keeping, the same.”

This section has remained unaltered since its adoption in 1849. It was then section 190.

The case of *Moore vs. Westervelt* is an important one in illustration of the meaning of the section, and duty of the sheriff.

It is first reported before the Superior Court in 2 Duer's Reports, 59. The action was against the sheriff of New York for neglect of duty. The plaintiffs had brought a suit to recover a quantity of coal, then on board a schooner lying in the port of New York. The sureties, being excepted to by the defendant in the action, the sheriff left the coal on board during the time allowed for the justification. It was sunk by a storm, and damaged. The plaintiff recovered in the first action, and brought the present suit for his damages, by reason of the sheriff's neglect to remove or to protect the coal by proper measures. It was held that it was not a case for a submission of the question to the jury whether the sheriff was wanting in reasonable and proper care, in guarding the vessel against the consequences of the storm which arose and sunk her. It was clear there was evidence to show such neglect, which was uncontradicted. It might be that the question whether he was not liable for leaving it in an insecure place would arise on another trial.

After a new trial, the case came again before the Superior Court. (1 Bosworth, 358.) It was then held that, when a sheriff takes possession of personal property under service of legal process, he is bound to ordinary care and diligence in its custody—*i. e.*, the same care and diligence that a prudent man would take of his own property. But if the sheriff leave the property in the hands of the defendant in the action, he becomes the insurer of it

to the plaintiff, and nothing will excuse him, in the event of a loss, but the act of God, or of public enemies.

The judge at the trial took the question of negligence from the jury, leaving them to pass only upon the amount of damages.

Upon an appeal, Mr. Justice Selden, who delivered the opinion of the court, referred to the rule as to the negligence which would make a sheriff liable, as stated by Judge Story (On Bailments, § 130), and thought it was stating the doctrine somewhat too faintly. He was an officer whom the party was compelled to employ, and was clothed with a public trust. The doubt, therefore, was, not whether the officer is bound to take ordinary care, but whether he ought not to be held to a somewhat higher degree of vigilance.

It was held, however, that the question of negligence, whatever might be the rule, should have been submitted to the jury.

The sheriff in that case had left the property (coal on board a vessel) under the control of the defendant, and it was insisted that this of itself made him personally liable. Without determining what would be the general rule, and whether there was any distinction between cases on mesne or final process, the court held that as the sureties of the plaintiff had not justified at the time, the sheriff could not have safely delivered the property to him, and he was justified in omitting to incur the great expense of a removal, as there was reason to infer the assent of the master of the vessel to its remaining on board. It was incumbent on the plaintiff to show some degree of negligence on the part of the sheriff, beyond the mere fact of omitting to remove the coal.¹

Section 216.

"Claim of property by third person.

"If the property taken be claimed by any other person than the defendant or his agent, and such person shall make affidavit of his title thereto and right to the possession thereof, stating the grounds of such right and title, and serve the same upon the sheriff, the sheriff shall not be bound to keep the property, or

¹ 21 N. Y. Rep. 103.

deliver it to the plaintiff, unless the plaintiff, on demand of him or his agent, shall indemnify the sheriff against such claim, by an undertaking executed by two sufficient sureties, accompanied by their affidavits, that they are each worth double the value of the property as specified in the affidavit of the plaintiff, and freeholders and householders of the county. And no claim to such property by any other person than the defendant or his agent shall be valid against the sheriff, unless made as aforesaid; and notwithstanding such claim, when so made, he may retain the property a reasonable time to demand such indemnity."

This section was added to the Code in 1849, and has remained unaltered since.

This section does not apply where the sheriff has seized property wrongfully.

In *King vs. Orser* (4 Duer, 431), several propositions, including the one stated, were laid down. Although the sheriff could not before the Code, have been made liable as a trespasser for taking the goods described in the writ of replevin, from the possession of a third person claiming to be the owner, yet in the action which the Code has substituted for that of replevin, he can only take the property described in the affidavit of the plaintiff, when it is found in the possession of the defendant himself, or his agent. The statute, by necessary implication, authorized the sheriff to take the goods wherever they might be found in his county; since it was only when they could not be found therein, that he was authorized to arrest the defendant. But by the Code, the powers of the sheriff are much more limited.

If the property is in the possession of another, the sheriff can only free himself from liability as a trespasser, by showing that this person was in reality no more than an agent of the defendant, having possession in that capacity.

In *Edgerton vs. Ross and others* (6 Abbott's Rep. 189), there was an order to show cause why proceedings of claim and delivery should not be set aside. Ross, one of the defendants, had commenced an action in the Supreme Court against Davis and another, to recover possession of personal property. He took proceedings under section 206, &c.; and the sheriff took the chattels in question under a requisition.

Edgerton claiming to be the owner, brought this action in the Court of Common Pleas, against Ross and the sheriff, for the possession of the same goods. He took similar proceedings of claim and delivery, and issued a requisition to the coroner, requiring him to take the goods from the sheriff. *Held*, on motion of Ross, that the proceedings in the second action must be set aside as irregular.

Judge Hilton said: "It is a familiar rule, that when a remedy is provided by the statute in any case, and the proceeding by which the remedy shall be pursued is distinctly specified, it is a virtual prohibition against proceeding in any other manner, and all other modes are excluded in the cases to which the remedy relates. (4 Burr. 2305; 3 Comstock, 9.) If the plaintiff desired to claim the property in question, he should have made the affidavit specified in section 216 of the Code, and delivered it to the sheriff; who, unless indemnified against this claim, would restore the property to the parties from whom it had been taken."

The Revised Statutes provided for the case of a claim of property by a defendant, as well as a stranger. (2 R. S. 525, § 13.) If the defendant, or any other person who might be in possession of the goods and chattels specified in the writ, claimed possession of the same, or of any part thereof, and should pay to the sheriff his fees, and the fees of the jury for trying such claim, the sheriff was to take the goods and detain them in his custody, and should forthwith summon a jury to appear before him at such time and place as he should specify, which time should be within two days thereafter, to try the validity of such claim.

The present section relates singly to a claim by a stranger to the action, not an agent of the defendant. It comprises also two cases; first, of a taking out of the possession of the third party, who claims the ownership; and next, of a claim to the ownership, though possession has not been taken before the sheriff has taken the property. *King vs. Orser*, before cited, appears to decide that the sheriff cannot take property so circumstanced; and no doubt an action will lie against him. I do not know that it has been decided whether the course pointed out in the Revised Statutes may be pursued, or whether a claimant is not left in every case to his action.

Section 217.

“ Notice and affidavit, when and where to be filed.

“ The sheriff shall file the notice and affidavit, with his proceedings thereon, with the clerk of the court in which the action is pending, within twenty days after taking the property mentioned therein.”

Abatement.—An action for the recovery of personal property wrongfully detained, against a sole defendant, who dies before verdict or judgment, wholly abates. The court has no power to order it to be continued against his personal representatives. (Hopkins *vs.* Adams, 5 Abbott, 351 ; 6 Duer, 685.)

CHAPTER III.

INJUNCTION.

Introductory.—The writ of injunction has been always the most efficient instrument for carrying into effect the equitable jurisdiction of a Court of Chancery. The peculiar power of the court, and the redress it afforded, involved such a process, and it must of necessity have been almost coeval with the jurisdiction itself. One of its great principles was preventive, as distinguished from remedial, justice. Lord Campbell says,¹ “that after much investigation, he must express his clear conviction, that the chancellor’s *equitable* is as indubitable, and as ancient, as his common-law jurisdiction; and that it may be traced in a manner equally satisfactory. By equitable jurisdiction, must be understood the extraordinary interference of the chancellor, without common-law process, or regard to the common-law rules of proceeding, upon the petition of a party grieved, who was without adequate remedy in a court of common law; whereupon the opposite party was compelled to appear and to be examined, either personally or upon interrogatories; and evidence being heard on both sides, without the interposition of a jury, an order was made *secundum æquum et bonum*, which was enforced by imprisonment.”

The learning upon this subject is exhausted in Mr. Spence’s work upon the jurisdiction of the Court of Chancery; and he considers that injunctions were introduced by analogy to the interdicts of the civil law.² Injunctions to restrain actions at law upon instruments, which were unconscionable, or improperly obtained, were well known in the time of Henry VI.³ The title of Injunctions is found in the old Abridgments, and cases noted in the reign of Edward IV.⁴

¹ Lives of the Lord Chancellors, Vol. I., p. 30.

³ Lives of the Lord Chancellors, Vol. I.

² Vol. I., p. 674, *et seq.*

⁴ Ibid. 310.

Sir Thomas More was cautious in granting injunctions, yet allowed and maintained them with firmness where he thought that justice required his interference with the judgments of the courts of common law. He was of opinion that law and equity might be administered by the same tribunal, and he made an effort to induce the common-law judges to relax the rigor of their rules, with a view to meet the justice of particular cases; but not succeeding in this, he resolutely examined their proceedings, and stayed trials and executions wherever it seemed to him that wrong would be done from their refusal to remedy the effects of accident, to enforce the performance of trusts, or to prevent secret frauds from being profitable to the parties concerned in them.¹

Injunctions which interfered with the proceedings or judgments at common law, speedily aroused the jealousy and opposition of the common-law tribunals, and led to the bitter controversy between Lord Coke and Lord Chancellor Ellesmere, which was terminated by the decision of King James. The authority of the Court of Chancery was sustained, and has been acted upon ever since in England, and in a large number of the States that have grown up under the system of English law.²

It will be interesting, and not useless, to refer to the language of the distinguished law officers, most of them judges in after years, upon which the decision of James I. was founded :

“According to Your Majesty’s commandment, we have advisedly considered of the note delivered unto us, of the precedents of complainings and proceedings in chancery after judgments at common law; and have also seen and perused the originals out of which such note was abstracted; upon all which we do find and observe the points following :

“We find that there hath been a strong current of practice in chancery of proceeding after judgment, and many times after execution, continuing from the beginning of King Henry VIIIth’s reign until the time of the Lord Chancellor that now is; it being in cases where there is no remedy for the subject by the strict course of the common law, unto which the judges are sworn.

¹ Lives of the Lord Chancellors, p. 415, Henry VIII.; see also Spence Eq. Juris., Vol. I., p. 674.

² See Reports in Chancery, Vol. I.; Jurisdiction of the Court of Chancery; 1 *Collect Juridica*, 23; 1 Wooddeson’s Lectures, III.; Lives of the Lord Chancellors, II., p. 212.

"We find that the proceeding in chancery hath been after the judgment in actions of several natures, as well real as personal.

"We find that it hath been after judgment in Your Majesty's several courts, the King's Bench, Common Pleas, Justices in Eyre.

"We find it hath been after judgment obtained upon verdict, demurrers, and where writs of error have been brought.

"We find in many of the cases, that the said judgments are expressly mentioned in the bills in the chancery, and relief prayed thereupon—sometimes for stay of execution, sometimes after execution; of which kind we find a great number in King Henry the VIIIth's time.

"We find the matter of equity laid in such bills, in most of the cases, to have been matter precedent before the said judgment, and not matter of agreement after.

"We find in the cases not only the bill preferred, but motions, orders, injunctions, and decrees thereupon for discharging and releasing of the judgments, or avoiding the possession thereupon obtained; and sometimes for the mean profits, and the release of the costs, &c.

"We find in some of the cases, that this very point, that judgment hath been given, hath been stood upon by the defendants, and alleged by way of demurrers, and overruled."

Among the important changes made by the late acts in England, is one by which the courts of common law can issue an injunction order. By the Statute 17 and 18 Victoria, ch. 125, §§ 79–82, it was enacted, "that in all cases of breach of contract or other injury, where the party injured is entitled to maintain, and has brought an action, he may, in like case and manner as is therein before provided in respect to a mandamus, claim a writ of injunction against the repetition or continuance of such breach of contract or other injury, or the committal of any breach of contract or injury of a like kind, arising out of the same contract, or relating to the same property or right; and he may also in the same action include a claim for damages or other redress." (§ 79.)

By the 82d section, "it shall be lawful for the plaintiff, at any time after the commencement of the action, and whether before or after judgment, to apply *ex-parte* to the court or a judge for a

writ of injunction to restrain the defendant in such action from the repetition or continuance of the wrongful act or breach of contract complained of, or the committal of any breach of contract or injury* of a like kind, arising out of the same contract, or relating to the same property or right; and such writ may be granted or denied by the court or judge, upon such terms as to the duration of the writ, keeping an account, giving security, or otherwise, as to such court or judge shall seem reasonable and just; and in case of disobedience, such writ may be enforced by attachment by the court, or, when such court shall not be sitting, by a judge: *provided*, always, that any order for a writ of injunction made by a judge, or any writ issued by virtue thereof, may be discharged or varied or set aside by the court, on application made thereto, by any party dissatisfied with such order."

In our State the exercise of this power and employment of this writ, may be traced as far back as we have any records of the court. The history of the struggle against the court in colonial days, will be found in the works referred to in the note.¹

The Constitution of 1777 treats the chancellor as a known officer, and implies that the court is in existence.

By an early act after the revolution, the court was organized; and subsequent statutes prescribed the mode of exercising jurisdiction, and recognized the right to issue injunctions. (See the acts referred to, 1 R. L. 1813, p. 486.)

The subject of injunctions received early attention in the Rules of Court;² and in 1830, the Revised Statutes adopted a comprehensive and minute system for their regulation.³

The continuance of equity as a distinct branch of jurisprudence, and the application of equitable as well as legal remedies, are inferrible from the language of the Code, and have been repeatedly recognized by the courts.

In *Renbens vs. Joel* (3 Kernan, 488), Mr. Justice Selden has stated the result of a careful examination of the Constitution and the Code, in the following language: "It is in my judgment clear, that the Legislature has not the constitutional power to re-

¹ Preface to 1 Johns. Ch. Reports; History by Judge Daly, 1 E. D. Smith, 1.

² Rules of Chancellor Lansing, 41, 42, 43.

³ See, for a history of these provisions, Willard's Eq. Juris., p. 348.

duce all actions to one homogeneous form ; because it could only be done by abolishing trial by jury, with its inseparable accompaniment, compensation in damages, which would not only conflict with Art. I., § 2, which preserves trial by jury, but would in effect subvert all jurisdiction at law, as all actions would thereby be rendered equitable—or, by abolishing trial by the court, with its appropriate incident, specific relief ; which would destroy all equity jurisdiction, and convert every suit into an action at law.”

The learned judge cites the case of *Parsons vs. Bedford* (3 Peters' U. S. Rep. 433), and says : “ This case is a direct authority to show, what indeed is plain without authority, that the Constitution, by conferring jurisdiction in law and equity, has not only recognized the distinction between them, but placed that distinction beyond the power of the Legislature to abolish ; which, as has been shown, it could only do by abolishing one or the other of the two jurisdictions.”

It is of importance to notice, that these observations are made in reference to the 69th section of the Code, declaring that the distinction between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing, is abolished. It is added by the learned judge—“ As section 69 is plainly in conflict, not only with the Constitution, but with the subsequent provisions of the Code itself” (sections 253 and 254 are particularly noticed), “ it cannot aid us in putting the proper construction upon section 219.”

The Code has attempted to comprise in general language, if not to define, the cases in which a temporary injunction may be obtained. Its provisions are confined to the proceeding as a provisional remedy—one operating during the suit—and do not relate to a final injunction.

“ Mr. Justice Woodruff, in commenting upon the 219th section, observes : “ This very general language would seem to provide for every case in which a temporary injunction was proper before the Code. Indeed, it was not, in my opinion, the design of the Legislature to abridge the powers of the courts as courts of equity, to grant that provisional relief theretofore had by injunction. On the contrary, the last clause of section 219 is a

plain enlargement of the power.”¹ *Howard vs. Ellis* (4 Sandf. S. Ct. Rep. 369), and *Malcolm vs. Miller* (6 Howard Pr. Rep. 456), are cited to show, that the Code has not impaired the general power of the court to enjoin, where an injunction was before proper.

So, in *Woodworth vs. Lyon* (5 Howard, 463), Mr. Justice Barculo says: “To my mind it is apparent that section 219 of the Code has no reference to an injury under the forms of law, or by virtue of judicial proceedings; it cannot be construed to create new rights of action, or give new remedies.” He is speaking in reference chiefly to the first clause. See further the cases under section 219.

Section 218.

“Injunction by order.”

“The writ of injunction, as a provisional remedy, is abolished, and an injunction by order is substituted therefor. The order may be made by the court in which the action is brought, or by a judge thereof, or by a county judge, in the cases provided in the next section; and when made by a judge, may be enforced as the order of the court.”

This section has remained unaltered from the enactment of April, 1848. It was the 191st section of that Code, and was changed to the 218th in 1849.

The *writ* of injunction is only abolished as a provisional remedy. An injunction made upon hearing and decree, termed a perpetual injunction, was to be enforced by a writ. This will be, I apprehend, necessary now.²

The order of the Code is in every particular the substitute for the writ. By the former practice, the chancellor, or proper officer, indorsed an allowance of an injunction on the bill; an order

¹ *Merritt vs. Thompson*, 3 E. D. Smith, 284.

² 1 Fowler's Exch. Pr. 285. It is in the nature of a writ of execution or *habere facias possessionem*, when recovery of real property is the subject. *Seaton on Decrees*, 401, 407, 435.

was thereupon entered, and a writ under seal, pursuant to such order.¹

The order may be by a county judge, as well as by a judge of the court in which the action is brought.

For the cases upon the power of a county judge, see title "Arrest and Bail," section 180, *ante* p. 44.

It has been held that an injunction may be granted at the General Term.

In *Drake vs. The Hudson River R. R. Co.* (2 Code Rep. 67), a motion for an injunction had been made at the Special Term, and referred to the General Term. The court considered that such a motion could be made before it. The Code directed that the order might be made by the court.

In *The Town of Guilford vs. Cornell* (4 Abbott, 220), the General Term reversed a judgment, gave judgment in favor of the defendant, dissolving the injunction, and for costs. Afterwards, on a motion, the General Term made an order continuing the injunction until the decision of an appeal in the Court of Appeals. No undertaking was given on such appeal, except for costs under section 334.

Justice Balcom (at Special Term) says: "It was not necessary to inquire whether the court had the power to make that order, as it could not make the sureties on the undertaking originally given, sureties for subsequent proceedings. It was distinctly a new injunction. It was as to them, a simple order staying proceedings. Their liability was discharged by the judgment of the General Term for the defendants."

The case is reported in 18 Barbour, 615, and in 3 Kernan, 143; but nothing appears of the order at General Term.

A General Term may affirm, reverse, or modify a judgment. (§ 330.) It deserves consideration, whether part of a judgment of reversal of a judgment for a perpetual injunction, can be for a temporary injunction, under the idea of a modification.

So, it would seem, the case must depend upon the right of the General Term to grant an injunction originally.

I have not found any other case than the two cited, directly upon the question. See *post*. "The Effect of Appeal on an injunction," and *Hoyt vs. Carter*, 7 Howard, 140.

¹ 1 Hoffman's Ch. Pr. 81.

In *Dickerson vs. Cook* (3 Duer, 324), an injunction was dissolved at Special Term for want of a proper bond. The order was affirmed at General Term. But ordered that the injunction might be restored and continued, on the party giving, within ten days, a bond with two sureties in the amount of the judgment. Such bond was sued upon, and judgment recovered.

Upon the caution proper in granting an injunction, I content myself with referring to the opinion of the court delivered by Mr. Justice Woodruff, in *Fredericke vs. Mayer* (1 Bosworth's Rep. 227). "The exercise of this summary power should be guarded by a most cautious discretion, forbidding its exercise when it will operate oppressively, or work immediate injury, or where the right of the plaintiff is doubtful, or the facts are not clearly ascertained. It has been well said, that there is no power, the exercise of which is more delicate, which requires greater deliberation and discretion, or is more dangerous, in a doubtful case, than the issuing of an injunction." (Justice Baldwin, 1 Bal. C. C. Rep. 218.)

Section 219.

"Injunction, in what cases granted."

"(1.) Where it shall appear by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of some act, the commission or continuance of which during the litigation would produce injury to the plaintiff, *or*, when, during the litigation, it shall appear that the defendant is doing, or threatens, or is about to do, or procuring or suffering some act to be done, in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, a temporary injunction may be granted to restrain such act.

"(2.) And where, during the pendency of an action, it shall appear by affidavit that the defendant threatens or is about to remove or dispose of his property, with intent to defraud his creditors, a temporary injunction may be granted, to restrain such removal or disposition."

The provision in the first subdivision has remained the same from the enactment in 1848 (then the 192d section), except that the clause "would produce injury to the plaintiff" then was "would produce *great or irreparable* injury to the plaintiff." The words italicized were omitted in 1849, and the section has continued unaltered since.

The second subdivision, as above marked, was adopted in 1849, and has continued in the Code since that time.

These subdivisions are so marked by the author, for convenience of examination.

The exposition which the section has received in *Reubens vs. Joel* (3 Kernan, 488), as it comes from the highest authority, requires particular notice. Mr. Justice Selden says: "If we carefully scrutinize its provisions, it will be found to bear upon its face unmistakable evidence of a discrimination by the Legislature, in its enactment, between actions at law and suits in equity. The first branch of the section plainly applies to the latter class of actions exclusively. It provides that, when relief demanded in the complaint consists in restraining the commission or continuance of some act, or where, during the litigation, it shall appear that the defendant is doing or threatens to do some act in violation of the plaintiff's rights *respecting the subject of the action*, a temporary injunction may be granted, &c. Now, it is manifest that this provision can apply only to suits in equity, or suits made triable by the court, which is the same thing. The terms used incontrovertibly establish this. It is equally clear that, if the remaining branch of the section had not been intended to apply to actions of a different class, there would have been no necessity for inserting it as a separate and distinct provision. A few additional words would have included it in the previous clause. The only class of actions not provided for by that clause is actions at law—that is, actions which are made triable by jury; and to this class, therefore, it was clearly intended to apply. The last clause is the only part of the section which contains any thing new, the previous portion being, in substance, a mere embodiment of established equity principles."

Right to the relief demanded.—It must appear that the plaintiff is entitled to the relief demanded; and this must appear upon

the allegations of the complaint. It should be seen that, upon the case made, the court can adjudge the relief demanded.

Now, this is an undoubted general rule, and one necessary to be understood in its extent and qualifications. These must be gathered from the authorities.

In *Snowden vs. Noah* (Hopkins' Rep. 347), the court ruled that, as the right to the newspaper establishment there in question was not clearly in the plaintiff, the party must be left to the ordinary course of law. The injunction is used to protect rights which are clear, or at least free from reasonable doubt.

In *Hart vs. The Mayor, &c., of Albany* (3 Paige, 213), the Chancellor held, that where the right of a party was doubtful, the court would not grant an injunction to prevent an illegal interference with the same, until the right was established at law.

And in *Olmstead vs. Loomis* (6 Barbour, 152), it was laid down that, to authorize an injunction, there must be not only a palpable violation of the plaintiff's rights, but the rights themselves must be certain, and capable of being clearly ascertained and measured.

See, also, the *Attorney Gen. vs. Hunter, Devereux Eq. Rep.*, p. 12.

Yet, in a large class of cases, the court acts upon the rule of preserving property in the same situation as it exists; and will act upon this rule, even where the plaintiff's right to an injunction is not plainly made out on his own case, but eventual justice will be best answered by an injunction.

Thus, in *Ollendorf vs. Black* (1 En. L. & Eq. Rep. 114), Vice-Chancellor Bruce said: "It has been said here that the legal right is doubtful; that the mere existence of the doubt is sufficient to prevent the court from granting the injunction. In that I do not agree. I believe that doctrine to be new in this court; for it would interfere, theoretically and practically, with its jurisdiction daily exercised to a very great extent. The question of the legal right being in doubt is a matter for the serious attention of the court, and one to which it is right that weight should be given; but it is not a matter which renders it incumbent on the court to refuse the injunction. The court must be guided by a discretion exercised according to the exigencies and the nature of each particular case."

So, in *Clowes vs. Beck* (7 *ibid.* 42), the plaintiff claimed to be entitled to a beach under a grant from the Crown. The defendant's surveyors took stones from it to mend his way, alleging a right by custom, &c. It was held that the plaintiff's rights were legal, and must be decided by an action, but the court must consider which of the two parties would be likely to sustain the most injury; and, notwithstanding the want of distinct evidence to the injury, the court, to prevent possible mischief, would grant an injunction, and give the plaintiff leave to bring an action.

In *Beman vs. Rufford* (6 *ibid.* 106), the directors of a company had entered into a contract, the validity of which was doubtful, to expend money in laying down rails. They were restrained, until the validity of the contract was tried at law.

On the other side, in the *Shrewsbury & Birmingham R. R. Co. vs. The North-Western R. R. Co.* (1 *ibid.* 122), where the plaintiff's right was doubtful, and the continuance of the injunction was unnecessary for the protection of that right, should he establish it, and was injurious to the defendants, the injunction was dissolved. An account was ordered.

In *Cole vs. Sims* (23 *ibid.* 584), Lord Justice Bruce said: "At present, all we have to do is to say whether a *prima facie* case for an injunction has been made, and whether more mischief will be done by granting than by withholding it. I am of opinion that there is so much probability in the case for an injunction that it was properly granted, and ought to be continued; and that the mischief that may arise from continuing it, does not preponderate over that which would arise from refusing it."

In the case of *The Rector, &c., of the Church of the Holy Innocents vs. Keech*,¹ there was a covenant between the parties for the erection by the plaintiffs of a party wall of a foot in width, six inches on the land of each party respectively, one-half to be paid for by the defendant. The plaintiffs completed it from a point in the rear to a point short of the line of a street by about two feet six inches. The plaintiffs insisted that they were not bound to go further; the defendant, that the wall was to extend to the street line. The contract contained no authority to the defendant to build any part of the wall, upon the neglect of the

¹ General Term Superior Court, May, 1860, 5 Bosworth, 691.

plaintiff to do so. He was taking measures to do so by carrying out the party wall, and the complaint was to restrain him from building upon the plaintiffs' land.

Justice Woodruff, delivering the opinion of the court (after stating views upon other points), said: "We are of opinion that, as the case now appears, the defendant should be temporarily restrained from interfering with the stoop of the plaintiffs' house, or building upon their land."

"We do not think it clear that the plaintiffs were bound to extend the party wall further towards the street than they have done, or that the agreement, construed in the light of extrinsic facts, contemplated any other party wall than the plaintiffs have in fact erected; and if it is not clear that the defendant is entitled to have the wall erected where he now proposes to erect it; then, until the rights of the parties in this respect can be ascertained and settled by a full investigation, on a trial, all things should continue as they now are; and for this reason, that it is clear, that if the defendant be not so entitled, his cutting away of the plaintiffs' stoop, and building on their land, will do them a serious and permanent injury."

"It is true, that the general rule is, that in cases of doubt, an injunction should not be granted; that is, the plaintiffs should make a clear case; but this rule is not without qualification, and no better illustration is necessary than the present case affords. The plaintiffs are the legal owners of the land upon which the defendant threatens to build. They are in possession, and have occupied the ground by a permanent erection. This building upon their ground will do them a permanent injury. As the defendant's right is doubtful, he should not be permitted to go on until that right is settled. He can only lose the temporary use of his unimproved lot, and for this delay he can be fully compensated. The plaintiffs are in danger of a permanent injury to their building."

Lord Cottenham, in *Hilton vs. the Earl of Granville* (1 Craig & Phillips, 283-297), after weighing and balancing several considerations upon the facts of the case, says: "Now, by withholding the injunction, I may expose the plaintiff, not only to damage, but to an injury and a wrong; by granting it, on the other side, I am exposing the defendant to what, in the event of my

turning out to be mistaken in the view I take of the rights of the parties, will be an irreparable injury. The plaintiff's injury, if he sustains it, and ought not to have sustained it, will be, to a great extent, at least, capable of reparation ; it is a mere question of the value of the property, which may be compensated ; whereas, by no possibility can the injury done to the lord be compensated, if he is prevented for a considerable length of time from exercising a right which, in a certain event, may turn out to be his, to the full extent to which he claims it."

Analysis of the section.

The first subdivision of this section contains two branches. The first refers to an injunction at the commencement of the action.

"When it appears by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission of an act," &c.

This provision covers the case of a complaint the sole object of which is the obtaining a perpetual injunction against the commission or continuance of some act, where no other interposition or judgment of the court is asked for. It covers also the case of such a perpetual injunction being but a portion of the relief or remedy sought—being connected with, or ancillary to, something else demanded.

The second branch of this subdivision contemplates a case of an existing action, the object of which is to obtain some equitable relief by a judgment, and which judgment might be rendered ineffectual by the act sought to be restrained. It undoubtedly implies that the injunction need not have been originally sought in the complaint. The ground for it may have arisen subsequently.

The resemblance of this provision to the 82d section of the act of 17-18 Victoria, before noticed, deserves attention ; and the case of *Jessel vs. Chaplin & others* (37 En. L. & Eq. Rep. 472), is a valuable illustration of the principle of that statute. The action was one for the obstruction of ancient lights, and the declaration contained a count framed under the statute for an injunction. After verdict for the plaintiff, he obtained a rule that the defendants

show cause "why an injunction should not issue to restrain them from continuing the wrongful acts complained of in the action, and from committing any injury of the like kind relating to the property and rights of the plaintiff mentioned in the declaration; and from erecting, keeping erected, and continuing the erection of so much of the wall and buildings as is opposite to the west side of the messuage and premises of the plaintiff, described in the declaration, and known as the *Bull Inn*, &c., so or in such manner as to darken or obstruct any of the ancient lights or windows of the said messuage or premises, and from erecting any other building, or doing any other act, whereby the said light and air coming to and entering his said messuage and premises by means of the said windows may be obstructed, or such messuage and premises be in any way darkened, and from the repetition or continuance of any act whereby an injury may happen to the plaintiff."

It was admitted that the order should be made so far as to prohibit the going on with the work; but with respect to the portion which was directed against keeping up work already done, it was equivalent to a direction to pull down, and as such, properly the subject of a writ of mandamus. It was urged, on the other side, that mandatory injunctions were well known in the Court of Chancery.¹ The rule was made absolute, as prayed for, with the addition, that the writ should lie in the office till Michaelmas Term, the defendants undertaking to pull down as much of the wall and building as should be sufficient to restore to the plaintiff the full enjoyment of the light and air he had possessed previously, and to do the same to the satisfaction of a surveyor, to be agreed on, or nominated by one of the judges of the court.

Prayer for injunction.—It has been held in several cases, that the complaint should contain a prayer for an injunction; and where the injunction is sought for under the first branch of the first subdivision of section 219, it seems that this must be the rule. Section 142 prescribes that the complaint must contain a demand of the relief to which the plaintiff considers himself entitled. But under the second branch of the subdivision, it cannot be necessary. Indeed, that contemplates that a case may arise

¹ See *post*, Tit. Mandatory Injunctions.

for the injunction, after the litigation has commenced, and down to judgment, even if it does not, as Justice Hand suggests, involve the position that the necessity for an injunction must arise during the litigation. (*Hovey vs. McCrea*, 4 Howard's Pr. Rep. 31; *Vincent vs. Ring*, 13 *ibid.*, 239.)

Cases for an injunction.

The subject of the cases in which an injunction can be allowed, —cases pronounced “almost infinite in their nature and circumstances,”¹—must properly be treated under this first subdivision of the section. The second subdivision, as before noticed, relates to a peculiar class of actions, and a particular subject.

After considerable reflection as to the arrangement of the subject, I have adopted the following classification. It distributes the cases under several general heads, which admit of many subdivisions, and pursues something of a system.

The general heads are—

- I. Cases relating to real property.
- II. Cases relating to personal property.
- III. Cases relating to the productions of mind or art.
- IV. In respect to parties in peculiar characters or relations.
- V. The restraint of legal proceedings.

In reference to the two first heads, I follow the definition of the Code, by which real property comprises lands, tenements, and hereditaments; and personal property embraces money, goods, chattels, things in action, and evidences of debt.

It is true, that the two last classes would fall strictly under one or other of the preceding heads; but there are some points of law so peculiar to them, as to make a separation expedient.

I. The first head, that in relation to real property, is subdivided as follows :

1. Cases of waste.
2. Fixtures.
3. Trespass.
4. Nuisances.

¹ Justice Story.

5. Privileges and easements connected with land.

[A] Light and air.

[B] Lateral Support of land.

[C] Support by subjacent land.

[D] Party walls.

[E] Dedication.

6. Water privileges and rights to water.

[A] Surface water.

[B] Subterranean water.

[C] Falling water.

[D] Litoral rights on navigable streams.

[E] Litoral rights on innavigable streams.

[F] Ferries.

[G] Agreements; acquiescence.

[H] Interference by injunction.

7. Covenants relating to real property.

[A] As to the mode of using land.

[B] Affirmative and negative covenants.

[C] Building covenants.

[D] Penalty and liquidated damages.

8. Sale of land.

II. Injunctions relating to personal property are thus subdivided:

1. Transfer of negotiable and other instruments.

2. Transfer of stocks.

3. Sailing of a vessel.

4. Contested probate.

5. Specific chattels.

6. In aid of an action to recover personal property.

III. Relating to productions of mind or art.

1. Patents.

2. Copyrights.

3. Piracy of unpublished manuscripts.

4. Publication of letters.

5. Public lectures.

6. Secrets of trade.

7. Trade marks.

8. Miscellaneous.

[A] Editor and publisher.

[B] Libelous publications.

[C] Immorality of works.

IV. In respect to parties in peculiar relations.

1. Partners.
2. Corporations.
3. Public officers.
4. Receivers.
5. Executors, assignees, &c.
6. Married women.
7. Attorneys and counsel.

V. Restraint of legal proceedings.

1. General observations as to the effect of the Code.
2. Proceedings in courts of this State.
3. Other actions in the same court.
4. Proceedings in foreign courts.
5. Receivers and other officers.
6. Statutory foreclosure of mortgages.
7. Summary proceedings by a landlord, under the statute of New York.
8. Cancellation of instruments.
9. Administration of assets or trust funds.

I. 1. **Waste.**—"The ancient remedies for waste by writ of *estrepement*, and writ of waste at common law, are practically obsolete, and the modern practice in England, as well as in this country, is to resort to the prompt and efficacious remedy of an injunction bill to stop the commission of waste, when the injury would be irreparable; or by a special action on the case in the nature of waste, to recover damages."¹

The 450th section of the Code abolishes the action of waste, as the Revised Statutes of 1830 (2 R. S. 334, § 5), in effect, abolished the writ as a real action. The Code directs that wrongs heretofore remediable by action of waste, are subjects of action as other wrongs; in which action there may be judgment for damages, forfeiture of the estate of the party offending, and eviction from the premises.

¹ Kent's Comm. vol. 4, p. 77. A full statement of the ancient proceedings may be found in *Jefferson vs. The Bishop of Durham*, 1 Bos. & Pull. 120.

By section 451, the provisions of the Revised Statutes relating to the action of waste shall apply to an action for waste brought under this act, without regard to the form of the action, as far as the same can be so applied.

Action by whom.—The parties entitled to bring an action for waste done, are:

- (1.) *A remainder man, or reversioner.*

The action of waste always could be brought by one who had the next intermediate estate of inheritance.

But if there was an intermediate estate for life between the lessee for life and the remainder man or reversioner in fee, it did not lie at law. Yet chancery interposed in such a case;¹ and by the Revised Statutes of 1830 (vol. 1, p. 750, § 8), any one seized in remainder or reversion may have an action of waste or trespass for an injury to the inheritance, notwithstanding any intervening estate for life or years.

A mesne remainder man for life may obtain an injunction, although he could not support an action at law.

In *Perot vs. Perot* (3 Atkins, 94), the first tenant for life cut down timber, and the second tenant for life brought his bill for an injunction which was allowed.

- (2.) A landlord may, of course, sustain the action, and have the order for an injunction, unless restricted by express covenant.

Flamang's case, stated by Lord Eldon in *Hanson vs. Gardiner* (7 Vesey, 308), is the leading authority. There was a demise of Close A to a tenant for life, the lessor being landlord of an adjoining Close B. The tenant dug a mine in the former close, and worked by means of it into the other close. After hesitation, Lord Thurlow allowed the injunction as to working in either close.

A ground landlord may support the action against an under lessee.

In *Farrant vs. Lowell* (Ambler, 105; 3 Atkyns, 723), a bill was brought by a ground landlord, to stay waste in an under lessee, who held by leave from the original lessee. An injunction was granted by Lord Hardwicke.

- (3.) Purchasers of interests in land, having an equitable title,

¹ Mosely, 554; *Tracy vs. Tracy*, 1 Vernon, 23; *Eden on Injunctions*, 117, and note.

at least if put in possession, may obtain the writ. In *Norway vs. Rowe* (19 Vesey, 155), Lord Eldon said: "If the plaintiff has no legal title, but a contract authorizing him to call upon the court to clothe his possession with the legal title, and the answer admits the contract, an injunction will be granted; and the question then is, not whether affidavits are to be read to support the answer, but whether upon the admission of the equitable title, the court will, notwithstanding what is stated to oust the right, continue the subject as it was, until the truth of that by which the defendant attempts to get rid of the contract he admits, shall be tried." See also *Crockford vs. Alexander* (15 Vesey, 338).

(4.) *Trustees.*

The reasoning of Lord Hardwicke, in *Garth vs. Cotton* (1 Dickens, 183), in relation to Trustees to preserve contingent remainders, is applicable to all Trustees in whom the legal estate is vested. That is sufficient to enable them to sustain a bill for the protection of any thing that belonged to the inheritance, timber, mines, &c.

(5.) *Tenants in common and joint tenants and Parceners.*

Although by the statute of 13 Ed. I., cap. 22, reënacted in our statute of 30th January, 1787, and continued in the subsequent Revisions, an action of waste lieth, "where some or one of tenants in common do waste against the mind of the other," yet the writ of injunction appears to have been sparingly and reluctantly allowed.

The authorities down to *Twort vs. Twort* (16 Vesey, 132), are collected in *Eden on Injunctions*, p. 123. In *Smallman vs. Onions* (3 Br. Ch. Ca. 621), and in *Hole vs. Thomas* (7 Vesey, 589), such an injunction was granted. In *Hawley vs. Clowes* (2 John. Ch. Rep. 122), the bill prayed for the partition of lands, and for an injunction to stay waste in cutting down and carrying away the timber. The chancellor said: "The case of *Smallman vs. Onions* (3 Br. Ch. Rep. 621) admitted the authority of the court to grant the writ between tenants in common in special cases, as where the defendant was sworn to be insolvent; and Lord Eldon, in the subsequent cases of *Hole vs. Thomas* (7 Vesey, 582), and of *Twort vs. Twort* (16 Vesey, 128), admitted the propriety and necessity of this power in the court, between tenants in common,

where the waste was destructive of the estate, and not within the usual and legitimate exercise of enjoyment."

By the Revised Statutes of 1830 (2 R. S. 335, § 6), if the action be brought by a joint tenant or tenant in common against his co-tenant, the plaintiff, if he recover, may at his election take judgment for the treble damages, or have partition of the premises with a deduction of the damages from the share of the defendant. Section 3 gives the right of action in express terms.

(6.) *Heir at law.*

The statute 2 Ed. I., St. 2, gave the writ of waste to every heir in whose ward soever he or she be, and whether in ward or not, or of full age or within age, for waste or destruction in lands and tenements, of his or her inheritance, as well in the time of the ancestor, as at any other time after the inheritance descended. This statute has been made part of our own statute law from 1787 to this time.¹

(7.) *Infant en ventre.*

It has been ruled that a bill to restrain waste may be filed on behalf of an infant *en ventre sa mere*.²

(8.) A mortgagee, legal or equitable, may have the writ of injunction. (*Watson vs. Hunter*, 5 John. Ch. Rep. 169, and cases under title *Mortgagor*, *post*.)

(9.) A grantee of tenant for life may have the injunction.³

Action against whom.—By the Revised Statutes of New York (2 R. S. 1830, 334), it is declared who are liable to an action for waste—viz.: a guardian, a tenant by the curtesy, a tenant in dower, one for a term of life or years, or the assigns of any such tenant.

(1.) *A guardian.*

By the common law, a guardian in chivalry was punishable for waste.⁴ Statutes extended this liability to other guardians. He forfeited his wardship by the provisions of the great charter. Our own statutes, making a guardian generally liable, are of an early date.⁵

(2.) A tenant by the curtesy.

¹ 2 R. S. 334, § 4.

² *Luttrell's case*, cited *Prec.* in ch. 50, and authorities in *Eden on Injunctions*, 123.

³ *Kane vs. Vanderburg*, 1 John. Ch. Rep. 11.

⁴ *Black, Com.* 283.

⁵ Act of January 30, 1787; 1 R. L. 1813; 2 R. S. 1830, 334.

It was a subject of doubt whether, by the common law, the writ of waste lay against the tenant by the curtesy.¹ The statute of Gloucester, 6 Ed. I., c. 5, removed the difficulty, if it existed; and the statutes of our State have followed it.

(3.) A tenant in dower was always subject to the action. The statutes recognize the liability.

(4.) The better opinion seems to be that tenants for life and for years were exempt at common law, from the action, and were made liable by the statutes of Marlbridge and Gloucester.²

(5.) Our statute has also provided that the action may be brought against the assignee of any such tenant. By this I understand the assignee of either tenant by the curtesy, in dower, or for life or a term.

The case of *Bates vs. Schraeder* (13 John. Rep. 260) had decided that the action did not lie by the heir against the assignee of the tenant by the curtesy.

Tenants from year to year.—A tenant from year to year may be restrained from injuring the premises by taking away crops, manure, &c., against the course of husbandry, after receiving notice to quit. The tenant from year to year must treat the farm in a husbandlike manner, according to the custom of the country.

This was ruled in *Onslow vs.* — 16 Vesey, 173.

In *Kane vs. Vanderburg* (1 John. Ch. Rep. 11), the defendants were tenants from year to year, and the plaintiff a grantee of tenant for life. The bill stated that actions of ejectment were about to be brought, and that the defendants had been served with notices to quit, and were daily committing great waste, by cutting down wood and timber for sale, to the irreparable injury of the land and of the estate of the plaintiff. It was held that it was not essential that there should be an actual *lis pendens* to justify an injunction.

Tenant without impeachment of waste.—A tenant for life without impeachment of waste may be restrained from affecting the inheritance in an unreasonable and unconscientious manner; he may not cut timber left standing or planted for shelter or orna-

¹ 2 Black. Com. 283; 2 Inst. 301.

² Black Com. 283; Eden on Injunctions, 104, examining Reeves' His. C. L., vol. I., p. 186.

ment, although he may cut down ordinary timber, and convert it to his own use.

In *Clement vs. Wheeler* (5 Foster's N. H. Rep. 361), the subject was examined. The leading cases were noticed. It was held that a tenant for life without impeachment of waste could do no act to affect the inheritance in an unconscientious and unreasonable manner. In general, he might cut down timber for his own use, but he could not do so maliciously, so as to destroy the estate. Nor can he cut trees planted and left standing for the ornament or shelter of a mansion-house or grounds.

In *Morris vs. Morris* (3 De Gex & Jones, 323, 1858), a tenant for life without impeachment of waste pulled down the mansion-house, and built a better one in a more desirable situation. The bulk of the materials of the old house was employed in building the new one, and there was no evidence of any portion of the materials having been sold. A bill to declare that it was equitable waste, and to have an account of the materials, or compensation for the waste, was dismissed.

In *Leeds vs. Amherst* (2 Phillips, 117), the claim was for equitable waste, committed by the ancestor, while in possession as tenant for life. An old family mansion was demolished, and a quantity of timber in the park, admitted to a certain extent to be ornamental timber, was cut down. It was held quite immaterial to inquire whether that was a judicious arrangement or not for the family, for a tenant for life had no right to alter the nature of the property belonging to another person.

Mortgagor.—If a mortgagor is in possession, an injunction will not be granted to stay his cutting down trees, unless it is made to appear that the security is insufficient without the timber.¹

In *Murdock's case* (2 Bland's Rep. 461), and in *Salmon vs. Claggett* (3 Bland's Rep. 126), it was ruled that, where the debt had not become due, the court could interfere to protect the mortgagee against acts of the mortgagor.

In *Brady vs. Waldron* (2 John. Ch. Rep. 148), the bill was

¹ *Hippesly vs. Spencer*, 5 Mad. Rep. 422, and case cited. In *Farrant vs. Lowell*, 3 Atkyns, 728, Lord Hardwicke said: "Where there is only a mortgage for a term of years, and the mortgagor commits waste, the court, on a bill by the mortgagee to stay waste, will grant an injunction, for they will not suffer a mortgagor to prejudice the incumbrance."

filed by the mortgagee, for an injunction to stay waste by cutting timber on the premises, whereby the land would become an insufficient security for the debt. There was no suit pending for a foreclosure. The Chancellor granted the injunction, referring to 1 Dickens, 75; 3 Atkyns, 210, 237; and 3 Vesey, 105.

There must be some error as to the citation of the last case. The case, 3 Atkyns, 237, is, I presume, *Farrant vs. Lowell*, 3 *Atk. 723.

The case from Dickens is that of *Usborne vs. Usborne*. The allegation there was, that the vendee of the mortgagor, who was in possession, had entered upon the premises, and cut down several trees, and threatened to cut down more; by means whereof the mortgage security would be lessened. The injunction was allowed.

Several cases were cited, and among them *Gross vs. Chilton*, before Lord Thurlow, in which it was also allowed, after doubt and consideration; the Lord Chancellor thinking it was the mortgagee's fault in permitting the mortgagor to continue in possession.

But, under our system, an action of ejectment cannot be sustained by the mortgagee. (2 R. S. 312, § 57.) He cannot take possession hostilely. There is, therefore, a very clear reason for granting the injunction when the debt is not due; but not so clear after it is payable, unless an action to foreclose is instituted. *Humphreys vs. Harrison* (1 Jacob & Walker, 561), was a case in which a bill of foreclosure had been filed; and the injunction was granted on affidavits of the premises being a scanty security without the timber.

In *Ensign vs. Colburn* (11 Paige, 503), the bill charged the defendants with a fraudulent and unconscientious attempt to strip the mortgaged premises of the timber thereon, which was the principal value of the premises, with the intention of defrauding the complainant out of his security, after the mortgagor had been decreed to be a bankrupt, and when he had no longer any hope of paying the mortgage debt, nor had any interest in the mortgaged premises. "Without intending, therefore, to question the rights of a mortgagor to cut timber upon mortgaged premises whenever he can do it without committing waste, and to appropriate the timber thus cut to his own use, provided it is not done

with a fraudulent intent in reference to the mortgagee, I think the injunction in this case ought not to have been dissolved, even so far as the order appealed from dissolved it."

The injunction was retained even as to timber already cut.

In *King vs. Smith* (2 Hare's Rep. 239), the court define to some extent, what shall be deemed a scanty security for the mortgaged debt, so as to justify an injunction to stay waste against a mortgagor in possession. It is not that the property* will scarcely pay the debt, interest, and costs, but that it will not give that entire security, if the timber is taken from it, which the mortgagee contracted for in the original transaction.

"A mortgagee out of possession is not entitled to an injunction as of course. There must be a special case made. If the security is sufficient, the court will not grant an injunction; but what is sufficient security? No mortgagee, who is well advised, would lend his money unless the mortgaged property was worth one-third more than the amount lent at the time of the mortgage. Will the cutting of the timber substantially impair the value which was the basis of the contract between the parties at the time it was entered into? Such is the inquiry."

Mortgagee in Possession.—In *Farrant vs. Lowell* (3 Atkyns, 723), Lord Hardwicke said: "Where a mortgagee in possession commits waste by cutting down timber, and the money arising from the sale of the timber is not applied in sinking the mortgage debt, the court, on a bill brought to stay waste, will grant an injunction."

Subjects of Waste.—Waste is described to be a spoil or destruction in houses, gardens, trees, or other corporeal hereditaments. These three are the general heads of waste, viz.: in houses, in timber, and in land.¹ Our statute points out the subjects to be, "houses, gardens, orchards, lands, woods, or of any other thing belonging to the tenements so held."²

Houses.—The tearing down of buildings, the subject of an unfulfilled contract of sale, or covered by a demise, or to which a party as reversioner, or otherwise, has a title, present or eventual, is waste.

Thus, in *Pettee vs. The Eastern Counties Railroad Comp.* (8

¹ 2 Black. Comm. 284.

² 2 R. S. 1830, p. 334.

Simons, 483), there was a contract of sale of a house and lot, the price to be settled by arbitration. The award had not been made. The purchaser was proceeding to pull down the building, and was enjoined.

In *The Mayor of London vs. Hedger* (18 Vesey, 355), there was a covenant to repair by a lessee, and at the end of the term to surrender the buildings in good condition, not only those in existence at the demise, but such as the lessee should erect. He was, on the eve of the expiration of the lease, tearing down the buildings and carrying off the materials. The Master of the Rolls thought that the covenant in the lease did not preclude the remedy by injunction.

In *Winship vs. Pitts* (3 Paige, 259), the chancellor said: "Whatever doubts may formerly have been entertained upon the subject, I have no hesitation in saying, that by the law of this State, as now understood, it is not waste for the tenant to erect a new edifice upon the demised premises, provided it can be done without destroying or materially injuring the buildings or other improvements already existing thereon. I admit he has no right to pull down valuable buildings, or to make improvements or alterations which will materially and permanently change the nature of the property, so as to render it impossible for him to restore the same premises substantially at the expiration of the term; but to apply the ancient doctrine of waste to modern tenancies, even for short terms, would, in some of our cities and villages, put an entire stop to the progress of improvement, and would deprive the tenant of those benefits which both parties contemplated at the time of the demise, without any possible advantage to the owner of the reversion. Upon the principle of the modern cases, it cannot be waste to make new erections upon the demised premises, which may be removed at the end of the term without much inconvenience, leaving the property in the same situation it was in at the commencement of the tenancy, and the materials of which new buildings, if left on the premises, would more than compensate the owner of the reversion for the expense of their removal."

Alteration of buildings.—In several cases the material change of a building demised, or the conversion of it into one to be used for different purposes, will be waste, and the intended alteration may be restrained.

In *Green vs. Cole* (2 Saunders, 252), it was held that the conversion of a corn mill into a fulling mill, or a brew house into any other office, was waste.

In *Bridges vs. Kilburn* (cited 5 Vesey, 689), Mr. Justice Buller considered that the change of a logwood mill into a cotton mill was waste.

In *Bannister vs. Sadler* (14 Vesey, 526), a private house had been leased, and the attempt was made to turn it into a shop for the business of a coach-maker. There were several material considerations in the case to support an injunction; but in relation to the point now discussed, Lord Eldon said: "If the effect of the change will be the entire alteration of the nature of the property, I am not prepared to say that the court will not interfere. The plaintiffs had represented they wanted the property as a private house. The altering it into a coach-maker's shop, as attempted, would require the alteration from top to bottom." The injunction was maintained.

In *Douglass vs. Wiggins* (1 John. Ch. Rep. 435), the bill was to stay waste. It stated a lease of a dwelling-house in Pearl street for four years; that the lease provided that the lessees, the defendants, were to lay out three hundred dollars in improvements, to be approved of by the lessors; that against their consent, the defendants were converting the whole dwelling into a store, were prostrating partitions, cutting through ceilings and floors, and fixing a wheel and tackle in the third story to raise heavy packages, which would be of great and permanent injury to the building. An injunction was allowed.

Woods and timber.—Much learning will be found in the English books as to the kinds of woods which may or may not be cut down for the purposes of repairs, or household use.¹ The authorities in our own, and in some of the sister States, will show a considerable difference in the law upon this head, and render unnecessary a detail of the English distinctions.

In *Watson vs. Hunter* (5 John. Ch. Rep. 169), the defendants were lessees for years, and the plaintiffs were grantees (by way of security) of the lessor. The bill alleged that the principal value

¹ Eden on Injunctions, 105-107; Drewry on Injunctions, 142-152, vol. 20, Law Library.

of the land was in the pine timber, and that the premises were a slender security for the demand; that the defendants had cut down, and were cutting down, large quantities of timber. The prayer was for an injunction against cutting, and against removing that already cut down.

The chancellor stated the general rule to be, that an injunction was only to restrain future waste, as an action of trover would lie for what had been cut. Perhaps, where the mischief would be irreparable, it might be necessary to interfere, and prevent the removal of the timber already cut. This was not to be done in ordinary cases. The injunction was confined to timber standing at the time of the service of process.

In *Jackson vs. Brownson* (7 John. Rep. 227), it was held, that the lessee of wild lands might fell the timber, so as to fit the land for cultivation; but not so as to permanently injure the inheritance, as by cutting down all the wood.

There was in this case a covenant by the lessee, that he would not commit waste. Van Ness, J., said: "The covenant must be construed with reference to the state of the property at the time of the demise. The lessee undoubtedly had a right to fell part of the timber, so as to fit the land for cultivation, but it does not follow that he may with impunity destroy all the timber, and thereby essentially and permanently diminish the value of the inheritance. Good sense and sound policy, as well as the rules of husbandry, require that the lessee should preserve so much of the timber, as is necessary to keep the fences and other erections upon the farm in good repair."

In *Kidd vs. Dennison* (6 Barbour's Rep. 9), the bill was to restrain waste by cutting timber, and the law was fully discussed by Mr. Justice Paige. The English doctrine of waste, as understood in England, was not applicable to a new and unsettled country. The whole farm, when originally leased, was in a wild and uncultivated state, with the exception of a few acres. The parties must therefore have intended that the lessee should be at liberty to fell part of the timber to fit the land for cultivation. But this right did not authorize the lessee to fell all the timber. The position of Van Ness, Justice, in *Jackson vs. Monnson*, is stated and adopted: "To what extent timber may be cut, before the tenant is guilty of waste, must, in an action at law, be left to

the discretion of a jury. There could be no right to fell timber merely for the purposes of sale and profit, without any reference to the preparation of the land for cultivation. But when cut for that purpose, a sale after severance was incident to the right. The consideration, whether the property was in effect benefited by the acts, was rejected by the court.

In *Rodgers vs. Rodgers* (11 Barbour's Rep. 595), it was held, that a reversioner could sustain an action against tenant for life and another, to recover damages for wrongfully cutting, removing, and converting wood, and also for drawing off the wood which had been cut, and converting it. All the parties must, however, have participated in both acts. A case, the leading object of which is to restrain future waste by an injunction, is one of purely equitable cognizance; and, as incidental to this jurisdiction, the court, when waste has been committed, will, to prevent a multiplicity of suits, direct an account and satisfaction for past injuries. The injunction may be granted against any one who colludes with the tenant.

In *Livingston vs. Livingston* (26 Wendell, 122), it was decided that it was waste for a tenant to cut down and use wood on the demised premises to burn brick for sale, when he had covenanted not to cut down or destroy more wood or timber than should be actually used and employed on the farm, and that he would not make any manner of waste. The President of the Senate said: "If it were really advantageous and desirable to reduce this woodland into cultivation, its being done by the tenant without the consent of the landlord, would injure the latter in just so far as the value of the timber exceeded the expense of cutting it down and clearing the land. But injury is not the test of waste; but the disherison of him in remainder or reversion. The tenant, in this case, has destroyed timber which he cannot reproduce, and has carried off the demised premises soil which he cannot restore. This is disherison. The estate in remainder or reversion is wasted."

The court, in *Harder vs. Harder* (26 Barbour, 409), say: "It is very clear that the owner of the life estate may cut down wood and timber for the necessary reparation of the fences, buildings, and erections upon the farm, and for fuel; and it is held, that he may clear so much of the land from wood as shall be neces-

sary or judicious to adapt it for cultivation or other agricultural purposes." (2 R. S. 336, '7; 6 Barbour, 9; 2 Hill, 157.)

In *Spear vs. Cutter* (5 Barbour's Rep. 486), the bill was to prevent future waste, and also to prevent the removal of the timber already cut, and for an account of waste already committed. The court, to avoid multiplicity of suits, allowed an account and satisfaction for what had been done, and held, that where the mischief to the plaintiff would be irreparable, it would prevent the removal of the timber already cut down.

By the Revised Statutes (2 R. S. 336, § 18), where an action for the recovery of premises has been commenced, the Supreme Court may make an order restraining the defendant from committing waste.

In *McGregor vs. Brown* (10 N. Y. Rep. 114, 6 Selden), the law is thus stated: When the law defines waste to be whatever does a lasting damage to the freehold or inheritance, it does not mean that it is to be left to a jury to determine, according to the opinions of witnesses, whether the act complained of causes such damage. Certain acts are, in contemplation of law, *per se* injurious to the inheritance, and the only subject of inquiry for the jury is, whether such acts have been committed. By the law of England it is considered waste to cut timber. It is also considered waste to convert woodland into meadow, or pasture, or arable land. These rules have been modified to some extent in this State in reference to wild and uncleared lands leased for agricultural purposes. (7 Johnson, 227; 6 Barbour, 9.) The cutting of trees by a tenant for years, except under special circumstances, is an act of waste. The opinion of witnesses, that the acts were not injurious to the inheritance, are not admissible.

In *Shipley vs. Ritter* (7 Maryland Rep. No. 8, 1855), it was ruled, "that injunctions might be issued to restrain the destruction of timber, ornamental, and fruit trees, on the ground of such being cases of great and irreparable mischief, and going to the destruction of the estate in the character in which it is enjoyed. The land was occupied as a dwelling plantation. A portion of the estate was in timber, valuable as well as ornamental; the defendants had converted part of the timber lands into pasture and arable land, and were continuing to cut the timber, and convert the land, destroying the forest trees that sheltered the dwelling

in winter, and gave shade in summer. If the trees had been planted for shade or ornament, the question would be too clear for argument. There was no difference in principle when they served those purposes as they stood. The selection of the place for building may have been guided by these circumstances."

See also *Clement vs. Wheeler* (5 N. H. Rep. 361), cited *ante*, p. 156.

In *Morris vs. Morris* (15 Simons' Rep. 505), although the mansion-house, to which ornamental timber was originally appurtenant, had been pulled down, yet the tenant for life, even without impeachment of waste, could be enjoined from cutting down the trees.

This was also ruled in *Wellesly vs. Wellesly*, (6 Simons' Rep. 497), where trustees were empowered to grant leases, and, at the request of the tenant for life, to pull down the mansion-house and sell the materials to pay the incumbrances; which had been done. The tenant for life, though unimpeachable for waste, was restrained from cutting down the ornamental timber in the park and grounds.

But in *Michlethwaite vs. Michlethwaite* (1 De Gex & Jones' Rep. 504), it was considered that ornamental trees were in general incident to a mansion-house, and if an owner had left it and torn it down with an intention not to return, a tenant without impeachment, could not be restrained from cutting down the ornamental trees.

Land.—The English law is very strict as to the rule which prevents a tenant from changing the use or nature of the land. The conversion of arable into wood, or of meadow into arable, provided it be ancient pasture, is waste; and injunctions have in all times been granted to prevent it. Converting a meadow into an orchard, or ploughing up a hop ground and sowing it with grain is waste.¹

"At law tenants cannot change the nature of the thing demised. Changing meadows into arable land; converting one species of edifice into another, is waste. Although the value of the premises be improved by the alteration, the landlord has a

¹Eden on Injunctions, p. 107, and cases in the notes; Drewry on Injunctions, 154, and cases.

right, if he pleases, to keep the premises in the same state as he demised them. (*Elliott vs. Wathing*, 1 Jones' Exch. Rep. 308; *Hunt vs. Browne*, 1 Sausse & Scully, 178.)

The observations of Lord Langdale in the case of the Duke of St. Albans *vs.* Skipworth (8 Beavan, 354), though applied to the case of a parson's glebe, are valuable for the general principles stated, and would be pertinent to cases in our courts. "By the law, as admitted between lessor and lessee, or between tenant for life and remainder man, very valuable improvements in agriculture may be prevented, during the temporary possession of a tenant, or a succession of tenants for years or for life. The time however comes when the fetters imposed by the contract, or relation between the parties, may be released: but if you apply the same law to the case of a parson's glebe, the course of husbandry and cultivation must remain the same in all time. What is once arable or pasture must always continue so, and no rector must employ any part of his glebe in any other manner than as he has found it employed, unless he can prove that it has been otherwise employed within some limited antecedent time."

The rule in our own courts probably is, that cultivation may be pursued in that manner which custom sanctions as good husbandry. (*Sarles vs. Sarles*, 3 Sandf. Ch. Rep. 601.)

Orchards and gardens.—The statute has enumerated orchards and gardens, as the subjects of spoil or waste. (2 R. S. 334, § 1.)

It was ancient law that the cutting down of fruit trees in an orchard was waste.¹ This is the case even when planted by the tenant himself.²

In *Wathcrell vs. Howells* (1 Campbell's Rep. 227), it was held to be waste for the tenant to plough up strawberry beds which had been planted by a former tenant.

Mines.—The general rule is that a tenant may not dig in quarries for stone, or in mines of metal, or coal, unless they were open at the time of the demise. Of course this rule is governed by any express provision, and to the extent of such provision.³

Even if there be a demise of lands with the mines, the lessee may not open new mines, if there be any already open. If there are none, however, he may open and work new ones. (*Sanders' Case*, 5 Coke, 12.)

¹ Coke Litt. 53 a.

² 2 Roll's Abr. 817.

³ Ibid.

Where there was a deed of settlement of lands, mines, waters, trees, &c., it was held that it was intended that the whole of the inheritance should pass, and tenant for life under it was restrained from opening mines. (*Whitfield vs. Newill*, 2 P. Wms. 240.)

In *Clavering vs. Clavering* (2 P. Wms. 388), it was held that a tenant for life could open new shafts or pits to pursue and work the same vein of coal before opened. An injunction was refused. To grant it might be the ruin of the colliery.

In *Gray vs. the Duke of Northumberland* (13 Vesey, 236, and 17 *ibid.* 281), the party was making preparations to open a coal mine, and was restrained, the court stating that the plaintiff must be put under considerable pressure to obtain a speedy trial of the right.

But where mines have been opened, and are in process of being worked, the court very rarely and reluctantly interferes till the title is settled. Any laches on the part of the plaintiff will defeat him. (*Birmingham Co. vs. Lloyd*, 18 Vesey, 515.)

The case of *Hilton vs. The Earl of Granville* (1 Craig & Phillips, 284), is full upon this, as upon other points of the law. The defendant had in his favor a custom established by verdict of a jury, that he could enter upon a copy holder and work mines. The plaintiff, though he must have known for some time, that there was every probability at least that the working, if continued, would bring him in contact with the assertion of the lord's right, and therefore make it necessary for him to apply for protection, made no application until the time when the workings had approached so near to his house, that it was quite impossible to grant an injunction which should continue till the legal right was ascertained, without altogether suspending the lord's works. The Lord Chancellor then considered carefully the relative damage and evil which would arise from granting or withholding the injunction, stating the rule to be, that the object of the interference of the court by interlocutory injunction, between two parties who are at issue upon a legal right, is the protection of the property in dispute until the right is ascertained. He refused the injunction, allowing the motion to stand over upon terms calculated to insure a speedy trial of the right at law.

Miscellaneous.

Heir at law and devisee.—In *Jones vs. Jones* (3 Merivale, 161), it was held that a court of equity had not power to determine the validity of a will of real or personal estate, and the bill in that case was held demurrable. The Master of the Rolls said: “There is a prayer, that in the mean time (that is, I suppose, until the trial of the action or issue), the defendants may be restrained from committing any spoil, waste, or destruction of the said real estate. No case was cited in which the court has interposed at the suit of heir or devisee, to restrain waste by either, while they are litigating their adverse rights in a court of law. One should think the case of a devisee a stronger one than that of the heir, because till the will is set aside, the *prima facie* title is in the devisee. Yet, in *Smith vs. Collyer* (18 Vesey, 89), an injunction was refused when applied for by the devisee against the heir. I own I cannot see a very good reason why the court which interferes for the preservation of personal property, pending a suit in the Ecclesiastical Court, should not interpose to preserve real property pending a suit concerning the validity of a devise. But as a condition of such interference, the court would certainly expect it to be shown that the party applying was proceeding with all expedition to bring the question to a decision; whereas here, the plaintiff, filing the bill about two and a half years after the testator’s death, does not state that even then any action had been brought, while the acts of waste and devastation are stated to have been committed soon after the testator’s death.”

In *Davenport vs. Davenport*, cited by Mr. Drewry (Suppl. to Injunctions, p. 29), the Vice Chancellor (Wigram) said: There was no case upon real estate where a party out of possession coming to the court and complaining of a party in possession, and claiming a right to be in possession, has granted an injunction restraining the defendant from using the legal rights claimed by him, until the actual right is declared at law. It was pressed on the part of the plaintiff, *first*, that the rule applied to personal property of various kinds of protecting it while the legal right is in a course of determination, ought to be applied equally to the protection of real estate; *second*, that though the court might refuse an injunction in such a case on an interlocutory applica-

tion, yet that was no reason for allowing a demurrer, because, possibly, at the hearing, ground might exist for an injunction, and the bill ought, therefore, to be retained. The court considered the decision in *Jones vs. Jones* as applicable in both points, and allowed a demurrer.

The bill was to restrain the defendant from cutting down ornamental and other timber.

But, in *Fingal vs. Blake* (2 Molloy's Rep. 50), Lord Chancellor Hart said: I have long doubted the soundness of the old decisions respecting waste. I think the court has jurisdiction to restrain waste by the heir who is disputing the will of real estate. Where the will is disputed by the heir at law, and he is in possession, it requires a strong case to take away the rents from him, whilst the will is disputed; but in a strong case the court will do it. It will prevent injury to the devisee. I have no doubt the court will readily exercise its power to prevent irreparable injury to the property. It would be absurd to abstain from doing so out of consideration for the heir.

I. 2. Fixtures.—The rules and distinctions laid down by Lord Ellenborough, in *Elwes vs. Maw*,¹ have been recognized in cases in our own courts, and elsewhere. The right to fixtures arises chiefly between three classes of persons: 1st, between heir and executor, in which case the rule obtains with the greatest rigor in favor of the inheritance, and against the right to disannex; 2d, between the executor of tenant for life, and the remainder man or reversioner, where the right to remove is considered more favorably for the executor; and 3d, between landlord and tenant, where the rule has been the most relaxed.

1st. *Heir and Executor.* By the Revised Statutes of 1830 (2 R. S. 82, § 6, sub. 4), things annexed to the freehold, or to any building for the purpose of trade or manufacture, and not fixed into the wall of a house, are to be deemed assets, and go to the executor or administrator.

By section 7, things annexed to the freehold, or to any building, shall not go to the executor, but shall descend with the freehold, to the heirs or devisees, except such fixtures as are mentioned in the fourth subdivision of the last section.

In *House vs. House* (10 Paige, 158), the chancellor said,

¹ 3 East, 28.

“that previous to the adoption of the Revised Statutes, there was a distinction supposed to exist in relation to what was to be considered a part of the realty, as between landlord and tenant, and as between the heir at law and personal representative. It was also supposed that an outgoing tenant might be permitted to remove fixtures of a particular description, placed by him upon the premises for a special purpose, which, as between the heirs at law and the personal representative of the owner of the freehold would have descended to the heir. But the legislature, in adopting the provision here referred to, probably intended to put the executor or administrator on the same footing with a tenant as to the right to fixtures. Such at least was the recommendation of the Revisers. (3 R. S. 339, 2d edit.)

“It was impossible, however, to define in a short sentence of three lines, what was to be considered a part of the freehold itself, and what were mere fixtures or things annexed to the freehold for purposes of trade or manufacture. We must still go back to the common law, and to the decisions of the courts, for the purpose of ascertaining what is a substantial part of the freehold, and what is a mere fixture or thing annexed to such freehold. We must also resort to the same sources of information to ascertain what is to be considered a part of a building, and what is in its nature mere personal property, and only annexed to such building temporarily, for the purpose of trade or manufacture.”

It was held in this case, where water wheels, mill stones, and bolting apparatus of a grist and flouring mill, with other fixtures of the same character, had belonged to the owner of the land and building, that upon his death they went to the heir at law, and not to the executor. Fixtures of this character were essential to the enjoyment of the inheritance; and, therefore, as much part of the freehold as the building and water power, which with them constitute the mill.

In *Murdock vs. Gifford* (18 N. Y. Rep. 28), the court say: “The cases of heir and executor and of vendor and vendee, in the absence of evidence of specific intention, have always been deemed identical in respect to their rights in a chattel claimed to be a part of the realty. It was so held in 21 Hen. VII., 26, and it has continuously since been so held. (*Holmes vs. Tremher*, 20 John. Rep. 30; *Miller vs. Plumb*, 6 Cowen, 668; *Farrar vs. Chauvetete*, 5 Denio, 527.)”

The provision of the statute referred to was declared to furnish the general rule for all cases and parties.

House vs. House is cited and approved. The court proceed: "It is obvious that the statute does not mean, that the executor shall take every thing not essential to the support of the walls of a building, but that only such things are spoken of as are not a constituent part of the freehold, or of the artificial structure erected on the land."

"The case of *Lawton vs. Scelmon* (1 Hy. Bl. 258), furnishes a criterion by which the character of chattels annexed to the freehold may be determined." That was a case of salt pans made of hammered iron, riveted together, brought into the salt houses in pieces, and which could be removed in pieces. They were held to belong to the heir. They were accessories necessary to the enjoyment and use of the principal. By removal they would lose all the value which their adaptation to the inheritance gave them, and become merely old iron. Their value was from their relation to the inheritance.

"Applying this principle to the case of a factory, the wheel or engine which furnishes the motive power, and all that part of the gearing and machinery which has special relation to the building with which it is connected, would belong to the freehold; while an independent machine like a loom, which if removed, still remains a loom, and can be used as such wherever it is wanted, and power can be applied to it, will retain its character of personality."

The looms in this case were in a woolen factory, connected with the motive power by leathern bands, and not otherwise annexed to the building than by screws holding them to the floor, which kept them steady when working, and which could be removed without injury to themselves, or to the building.

In *Ombony vs. Jones* (19 N. Y. Rep. 234), the lessee of an inn erected a ball room resting upon stone posts slightly imbedded in the soil, and removable without prejudice to the inheritance. It was held that the ball room was within the principle of erections made for purposes of trade, removable by the tenant.

"There was nothing in the mode of its annexation to the soil, or to the main edifice, which necessarily imparted to it the legal characteristic of immovability. It could be detached and taken away without injury to the reversion. Beyond all doubt it would

be real estate as between vendor and vendee of the land, or between the heir and the executor of the owner. But the rule prevailing in these relations is by no means decisive of the present question."

Mr. Justice Grover, in his opinion, says: "The rule to be gathered from the cases, I think, is, that a tenant may remove, during his term, all erections made by him for the purposes of trade that can be removed without injury to the land, or something permanently attached thereto. When the foundation on which a building rests is imbedded in the earth, he cannot remove the foundation. When the building rests upon such foundation, and is confined by its weight only, he may remove the building."

In *Ford vs. Cobb* (20 N. Y. Rep. 344), salt kettles were bought and mortgaged to the seller. They were imbedded in brick arches, but could be removed, without injury to them, by displacing a portion of the brick at an inconsiderable expense, and the course of the manufacture required that they should be thus removed and reset annually. It was held that they continued personalty as against a subsequent purchaser of the salt works, who had no notice of the facts other than constructively, from the filing of the chattel mortgage.

They would have been by the common law realty, to have passed to the grantee of the land, or the heir or devisee of the owner. It was probable that the Revised Statutes had not changed this rule.

Assuming that they would have been parcel of the real estate, yet, as they were originally personal in their nature, and could be detached without material injury to the realty, the agreement of the owner and mortgagee amounted to a continuation of them in their original character.

Whether the agreement or relation between the parties shall preserve the character of personalty in things so affixed to the freehold, as that, but for such agreement or relation, they would become a part of the realty, depends upon their essential character, and the mode in which they are annexed; for example, whether they can be removed without serious damage to the freehold, or substantially destroying their own qualities and value.

All the cases upon this branch of the law of fixtures proceed

upon the idea that erections, which would clearly be part of the realty under ordinary circumstances, are personal chattels as regards the rights of a tenant, who has put them up for the purposes of trade or manufacture. If a subject, which would otherwise be real estate, can be made personal by special relations between the parties, it is clear the same parties may effect the same thing by express agreement. *Mott vs. Patmore* (1 Comstock, 564) and *Godard vs. Gould* (14 Barbour, 662) are cited as examples of this proposition.

In *Robinson vs. Preswick* (3 Edw. Ch. Rep. 246), it was held that, whatever was annexed to the freehold, and would pass as between vendor and vendee, would pass as between mortgagor and mortgagee. When fixtures are included in a mortgage, the mortgagee may have an injunction to prevent their removal which would impair the security. This may be had when the debt is not due, nor any default in payment, and, of course, no proceedings taken to enforce the mortgage.

I. 3. **Trespass.**—The doctrine of the court has undergone a marked revolution as to injunctions to restrain trespasses. In the case of *Mogg vs. Mogg* (2 Dickens, 670), a search was made for precedents in which the court had restrained a trespasser, and none were found. And Lord Eldon, in *Norway vs. Howe* (19 Vesey, 147), observed, that he did not recollect of an injunction to stay trespass being ever granted, where the fact of the plaintiff's title to the property was denied by the answer.

An injunction is not allowed in favor of the owner in possession of land, who has an adequate remedy at law against a mere trespasser. Where the injury is not irreparable and destructive to the plaintiff's estate, but is susceptible of perfect pecuniary compensation, which the party may obtain in the ordinary course of law, an injunction cannot be allowed.

These propositions, stated in the language of judges, show the general rule, and the nature of the exceptions to it.

In *Stevens vs. Beekman* (1 John. Ch. Rep. 318), there was an owner in possession, and trespass by parties claiming under an adverse claimant of title, by cutting down timber, which constituted the chief value of the land. "Lord Eldon," says Chancellor Kent, "only allowed the writ in solitary cases, of a special nature, and where irreparable damage might be the consequence if the act continued. It has also been allowed in cases where the tres-

pass has grown into a nuisance, or where the principle of multiplicity of suits among numerous claimants was applicable. (6 Vesey, 167; 7 Vesey, 305; 8 Vesey, 89.) There is less necessity for the interference of this court since the statute (1 R. L. 525, now 2 R. S. of 1830, pp. 338 and 693) "makes the cutting down of timber a misdemeanor, punishable by fine and imprisonment, and also gives the party injured treble damages." The motion for an injunction was denied.

In *Livingston vs. Livingston* (6 John. Ch. Rep. 497), Chancellor Kent stated the rule against granting injunctions in these cases with less rigor, and noticed the tendency of the court in later cases to permit it in a large class of trespasses. He cites many cases in which it had been issued. In the principal case it was allowed, where the defendant claimed *estovers* in the plaintiff's lands. A trial had been had at law, and a decision against him, and another suit was depending, involving the same question. It was just and necessary, to prevent multiplicity of suits, that the further disturbance of the freehold should be prevented until the right was settled.

In *Jerome vs. Ross* (7 John. Ch. Rep. 315), the subject was again before the learned Chancellor, and he again reviewed numerous cases. He restates and amplifies the rule laid down in *Stevens vs. Beekman* in all its force: "I do not know a case in which an injunction has been granted to restrain a trespasser, without showing that the property itself was of peculiar value, and could not well admit of due recompense, and would be destroyed by repeated acts of trespass. In ordinary cases the damages to be assessed by a jury will be adequate for a check, and for recompense."

The principle of these decisions is sustained in the *New York Printing Co. vs. Fitch* (1 Paige's Rep. 97); *Hart vs. The Mayor of Albany* (3 *ibid.* 213); *Anthony vs. Brooks* (5 Georgia Rep. 576); *Amelung vs. Sechamp* (9 Gill & Johns. 468); and *Kerr vs. Bierkower* (3 Maryland Ch. Decisions, 499).

In *Haigh vs. Jaggar* (2 Collyer Ch. Cas. 231), Vice-Chancellor Sir Knight Bruce said: "I am not convinced, that where a man is in possession, however full and complete, of an estate, by a title simply and merely adverse to that of another by whom the estate is, whether at law or in equity, claimed against him, without any

privity between them—such a state of things, if the party in possession, whether truly or untruly, swear his title to be just and valid, or that of his adversary to be unjust and invalid, does of necessity prevent a court of equity from interfering to restrain the party in possession from stripping the estate of its timber, pulling down the mansion, or other such acts. It is, I think, certainly true that the Court of Chancery does not treat questions of destructive damage to property now, exactly as it did forty or fifty years back; that its protection in such respects is more largely afforded than it then generally was.”

So in the *Union Railway Co. vs. Bolton* (3 Railway Cases, 345), Vice-Chancellor Sir J. Wigram said: “The jurisdiction of the court to grant injunctions in cases of pure trespass, is comparatively of modern establishment; but it is now clearly settled, that in cases of trespass, under color of title, where the mischief is irreparable, the jurisdiction of the court exists; and I incline strongly to the opinion that, whether the mischief be irreparable or not, this court ought, by decree, at least, if not upon motion, extend and apply the jurisdiction of preventive justice to all cases of trespass, in which, by analogy to cases of specific performance, damages would be an inadequate and uncertain remedy, and the protection of the right in issue the only mode of doing complete justice between the parties.”

I. 4. To restrain nuisances.—The right to interfere and restrict the use of property as producing a nuisance to an individual, is founded upon his right to property, and the irreparable damage or great injury to its enjoyment, resulting from the existence and use of what is sought to be restrained.

I am not aware of any case in which an injunction has been granted, at the instance of an individual suitor, when there was no other ground for it but an injury to personal health and comfort. It is the effect upon the enjoyment and value of property that warrants the interference.

Mr. Eden says: “The author has not been able to find a precedent in which the court has actually interfered to restrain the carrying on of a noxious trade, destructive to the health and comfort of the neighborhood.”¹

¹ On Injunctions, p. 159.

In *Crowder vs. Tinkler* (19 Vesey, 617), Sir Samuel Romilly admitted that danger to life was not a ground for an injunction, but the claim to injury to property could not be weakened by it. The Lord Chancellor said: "An injunction could be issued, not on the ground of nuisance, but of danger to property."

In the case of the Attorney-General *vs. Cleaver* (18 Vesey, 211), there was an information on the relation of individuals upon the ground of the offensive and unwholesome smell arising from a manufacturing of soap, or black ash; it was held that the injunction could not be allowed until a trial at law should be had.

In *Barnes vs. Baker* (Ambler, 158), Lord Hardwicke says that the application should be by the Attorney-General, when the court had the power to enjoin in cases of public nuisance. A similar rule is stated in *Anon*, 3 Atkyns, 750.

In late cases, the rules upon this head are rendered to a considerable extent definite and consistent.

In *Melter vs. Self* (4 Eng. L. & Eq. Rep. 15), a landowner had built a house and laid out gardens and shrubbery before 1829, and let the same to a tenant. The house was occupied continually down to 1851. In 1850, the owner of adjoining land began to manufacture bricks of the clay or earth of his land, by burning in clamp, within 144 feet of the house, and 15 feet of the stable. On a bill by the landowner and his tenant, it was held that the brick-making was a private nuisance, and (both parties requesting the court not to send the case to a court of law) an injunction was granted to restrain the defendant from burning brick on his ground, so as to occasion damage or annoyance to the owner or occupier of the house and grounds.

In *Spencer vs. The London & Birmingham Railway Co.* (8 Simons, 119), and in *Sampson vs. Smith* (8 Simons, 193), the distinction was taken, that where the public nuisance particularly affected the individuals complaining, so as to cause a special damage to them, they could sue without the Attorney-General.

In *Tichenor vs. Wilson* (4 Halst. N. J. Ch. Rep. 197), the bill set forth that injury arose to the property and health of the plaintiff from chemical works on land adjoining, owned by the defendant. It was held that it was necessary for him to make out a clear case of nuisance and of irreparable injury. The complainant having lived three and a half years in the place, after the

works had been in operation, and there not having been any material change in them during that period, an injunction was denied.

Mr. Eden (page 163) enumerates, under the title of private nuisances, various interferences with the enjoyment of property, which are arranged in this work under distinct heads: such are obstructions to streams, ancient lights, ferries, &c. The present observations refer to nuisances of a public or common nature.

It has been determined that of this character are a brew-house, glass-house, lime-kiln, dye-house, tan-pit, or swine-sty, if set up in such part of a town as to incommode a neighborhood. The erection of powder mills and magazines near a town is of the same description.¹

In *The Attorney-General vs. Sheffield Gas Co.* (19 En. L. & Eq. Rep. 639; 3 De Gex, McNaughten & Gordon, 316), the court refused to interfere by injunction, where the nuisance was of a trivial character, and lasted but a few hours at a time. The principle on which the court interferes by injunction is the inadequacy of the remedy at law, and it is on the ground of injury to property that the jurisdiction rests.

In *Haines vs. Taylor* (10 Beavan, 75), the defendant was proceeding to erect gas works on a piece of ground within eighty-eight yards of the plaintiff's house. No gas had yet been made, and so the injury was prospective and contingent. The evidence was conflicting whether, by scientific proceedings, all offensive effect in the manufacturing of gas would not be removed. The court refused to restrain the defendants from proceeding with their building and making gas.

In *Phoenix vs. The Commissioners of Emigration* (Special Term of the Superior Court, 1 Abbotts' Rep. 466; General Term, 12 Howard's Pr. Rep. 1), the judge at Special Term says: "Few points are better settled than this—that a Court of Chancery will interfere by injunction when the thing sought to be prohibited is in itself a nuisance, and irreparable mischief will ensue, unless the prohibition is granted before a trial at law. If the thing to be enjoined is not noxious of itself, but something which may, according to circumstances, prove to be so, the court will gen-

¹ Comyns. Abr. Tit. Nuisance.

erally refuse to interfere until the matter has been tried at law. But, if the magnitude of the injury to be dreaded is great, and the risk so imminent, that no prudent man would think of incurring it, the court will not refuse to interfere on the ground that there is a possibility that the anticipated injury from the noxious erection may not happen.

These are the general rules laid down by Lord Brougham,¹ adopted by Chancellor Walworth (6 Paige, 563), and sustained and applied in the following cases: *Rowe vs. The Granite Bridge Comp.* (21 Pick. 344); *Vaughan vs. Law* (1 Humphrey, 123); *Kirkman vs. Houck* (11 Humphrey, 406); *City of Georgetown vs. Alexandria Canal Comp.* (12 Peters, 92); *White vs. Cohen* (19 En. L. & Eq. Rep. 149).

“While the general rule is thus stated, it will be noticed that, in many of the authorities, the effect of the intended erection was an expected injury to property merely. This was the case in *The Mohawk Bridge Co. vs. The Utica & Schenectady R. R. Co.* (6 Paige, 554), where it was alleged that the erection of a new bridge by the defendants, would be, by damming up the ice and otherwise, to cause great damage to the bridge of the complainants.”

The principal cases which relate to nuisances to health and comfort, connected with property, are stated by the court to be the following: *Anon* (3 Atk. 750); *Catlin vs. Valentine* (9 Paige, 576); *The Burnt Island Whale Fish. Co. vs. Trotter* (5 Wilson & Shaw, 649); *Swinton vs. Pedrie* (15 Shaw & Dunlap, 775; *McLean & Robinson's Parl. Rep.* 1018); *The Mayor of London vs. Bolt* (5 Vesey, 129); *Attorney-Genl. & others vs. Blount* (4 Hawks, 384).

“We find most of these cases to be those of slaughtering houses. Now, such an erection is indictable as a nuisance at common law. (*Rex vs. Cross*, 2 Carr. & Payne, 483; *Rex vs. Watts*, *ibid.* 486.) The Scottish case of *Catlin vs. Valentine*, and several in our courts, are open to the comment that, *prima facie*, the trade or building to be inhibited was indictable as a nuisance, and the court would not permit an experiment to be made to ascertain whether untried, though perhaps efficient means, might not remove or diminish the evil.

¹ Cooper's Rep. Temp. Brougham, 343.

“The Scottish case of *Swinton vs. Pedrie* deserves particular attention. The bill of suspension and interdict was to restrain the erection of a range of shambles and slaughter-houses, which, it was alleged, would prove a nuisance to the property of the parties, and would pollute a mill-head which passed the neighborhood. The interdict granted by the Lord Ordinary, to whom it was presented, was absolute, restraining the erection of the buildings, as well as the intended use of them as shambles. This was *ex-parte*. On a hearing, he recalled the interdict, so far as it prohibited the erection of the buildings, but no further. When the record was closed (proofs being taken), another Lord Ordinary made the interdict permanent, as it was modified. On an appeal, the plans by which the party expected to remedy the evil were ordered to be submitted. This was done, and the Scottish Appeal Court adhered to the interdict.

“Then, in the House of Lords, it was recognized that the effect of the interdicts, as they stood, was to allow the party to go on with the building. The result was that the interdict was sustained, but with a qualification or declaration which would enable the party to apply to the court thereafter for an opportunity to try the experiment whether the means he had devised could be effectual to remove the nuisance. The court was not to be prevented from recalling the interdict, if so advised.

“The foundation of the decision throughout was, that a slaughter-house in a city was, by the law of Scotland as of England, a common nuisance.

“It is impossible to say that the law has pronounced an Emigrant depot in a city to be a public nuisance. Its character must be established by the nature of the diseases of its inmates; their frequency and extent; the number of persons received; the peril to health arising from their presence; the location of the edifice as to a large or scanty population in its vicinity; the precautions which may be used and can be depended upon, and many other circumstances peculiar to each individual case.”

The injunction was refused.

In *Penniman vs. The Balance Co.* (13 Howard, 39), the rule was recognized, that an individual whose right to property was affected, could sustain a bill to restrain a nuisance which worked special injury to him.

In *The City of Georgetown vs. The Alexandria Canal Co.* (12 Peters, 91), it is stated: "The court of equity, pursuing the analogy of the law, that a party may maintain a private action for special damage, even in case of a public nuisance, will now take jurisdiction in case of a public nuisance, at the instance of a private person, where he is in immediate danger of suffering a special injury, for which, under the circumstances of the case, the law would not afford an adequate remedy."

In *Corning vs. Lowerre* (6 John. Ch. Rep. 439), this doctrine was acted upon, where the defendant was encroaching by a building upon a street which had been opened and regulated for twenty years, and the complainants, owners of lots on it, would be injured. And in *Catlin vs. Valentine* (9 Paige, 575), it was held that a slaughter-house in a city was *prima facie* a nuisance to the neighboring inhabitants, and might be restrained by injunction. It was not necessary that a noxious trade should endanger health. It was sufficient if it rendered the enjoyment of life and property uncomfortable. The bill was by several owners of property in the vicinity, and was filed while the building was being erected.

By the 69th section of the act of April 17, 1860, to provide against unsafe buildings in the city of New York (Sess. Laws, ch. 490), "the said courts" (courts of record in the city, § 68) "respectively, shall, in an action to be brought by the said superintendent in the name of the Fire Department, restrain by injunction the erection or alteration of any building, part or parts of a building, shed, wall, chimney, staging or structure in the city of New York dangerous to life or liberty, and shall decree that the same, whether erected or altered, or in the course of erection or alteration, be taken down or removed." The sheriff is to execute the decree.

I. 5. Privileges and easements connected with land.

[A] *Light and air.*

Whatever was the rule of the English law, as interpreted by decisions before our revolution, as to which doubts have been stated, the English act of 2 and 3 Wm. IV., cap. 71, § 3, has settled the law of that country. "That section simplifies and almost new founds the right to access of light. It founds the right upon the actual enjoyment for the full period of twenty years

without interruption, unless that enjoyment be shown to be had under a consent in writing. It puts the right, therefore, on the simplest foundation, with the simplest exception." (Per Coleridge, Justice, in *The Merchants' Tailor Co. vs. Truscott*, 34 Eng. L. & Eq. Rep. 616.)

Creswell, Justice, in the same case said: "By this section a person who has the access of light for the full period of twenty years without interruption, obtains a right to it. The statute does not say, a person who has enjoyed it as of right, for every one has a right to open a window on his own soil. It is true that his neighbor has a right also, thus far, that at any time within twenty years he may build upon his own land, and obstruct the access of light and air; for within twenty years no right is gained against him. The statute says, when it has been actually enjoyed for so many years without interruption, the right shall be absolute and indefeasible. It is not absolute, if another person has a right to obstruct it; it is only conditional."

The case also decided that the custom of London as to lights, was abrogated by the statute.

By that custom, the lights of a neighboring house might be obstructed however ancient, if the party built on an old foundation.

The case of *Back vs. Stacy* (2 Russell's Ch. Rep. 121), is an example of an injunction upon the basis of the former English law, restraining the owner of a house from making erections or improvements, so as to darken or obstruct the ancient windows of an adjoining house.

The law of our own State appears to be fully settled, that no prescription of time—nothing indeed but covenant, will prevent the erection of a building, by the owner of adjoining property, which will entirely shut up and obscure the lights of another building.

In *Packer vs. Foote* (19 Wendell, 309), the reasoning of Justice Bronson, acquiesced in by Chief Justice Nelson, strikes at the whole law, as well of the acquiring a title by uninterrupted use and enjoyment for over twenty years, as of any right founded on the presumption of a grant. "In the case of lights, there is no adverse user, nor indeed any use whatever of another's property; and no foundation is laid for indulging any presumption

against the rightful owner . . . There is, I think, no principle upon which the modern English doctrine on the subject of lights can be supported. It is an anomaly in the law. It may do well enough in England; but it cannot be applied to the growing cities and villages in this country without the most mischievous consequences."

In *Banks vs. The American Tract Society* (4 Sandf. Ch. Rep. 438, 464), one question noticed by the Vice-Chancellor was, as "to the complainant's right to light and air from the Spruce-street lot, claimed from its uninterrupted enjoyment for a sufficient length of time to ripen into a presumptive title. It was insisted that, according to the established law of this State, no such right can be acquired by lapse of time. That such enjoyment of light and air is not adverse or hostile to any right of the owner of the adjoining land, and cannot become the foundation of a presumption of right to continue the use as against such owner."

The Vice-Chancellor refers to *Packer vs. Foote* as probably deciding the point, and to *Mahan vs. Brown* (13 Wendall, 263), *Roberson vs. Dittinger* (1 Green's Ch. Rep. 57, N. Jersey), and to a decision of the Court of Appeals in South Carolina, as holding the contrary doctrine; that is, that the enjoyment of the light and air is an easement, which twenty years uninterrupted use will ripen into a right.

In *Palmer vs. Wetmore* (2 Sandf. Sup. Ct. Rep. 314), it was expressly decided that a landlord, who owned land adjoining the demised premises, had a right to build on such land, although he might thereby darken and obstruct the windows in the tenement demised. It was not, however, a question of ancient lights. The demise was in May, 1847, for three years, and the case was heard in February, 1849.

In *Myers vs. Gemmel* (10 Barbour's Rep. 537), the subject was very fully examined, and it was held, that the common law of England on the subject of light and air, as an easement or incident to real estate, was not the law of this country; and that a landlord, who had demised a lot in New York without any covenant, was at full liberty to darken or stop up the windows of the leased property, by an erection on his own lot.

The question as to the acquisition of a right by a user of twenty years, did not expressly arise in the case.

[B] *Lateral support of land.*

It is very fully settled in England, that a party is entitled to have the soil of his neighbor remain unaltered by any voluntary act, so far as it is necessary to give support to his own land in its existing condition. The English authorities appear also to settle, that if a house has been erected on land, and occupied for twenty years, the adjoining owner may not dig his own ground in such a manner as to injure the building, although the soil, but for the superincumbent weight, would not have been interfered with.

In *Humphreys vs. Brogden* (12 Queen's Bench, 739, 1850), Lord Campbell, Chief Justice, said: "In the case of adjoining closes which belong respectively to different persons, from the surface to the centre of the earth, the law of England has long settled the degree of the lateral support which each may claim from the other. The right to lateral support from adjoining soil is not, like the support of one building upon another, supposed to be gained by grant, but is a right of property passing with the soil. If the owner of two adjoining closes conveys away one of them, the alienee, without any grant for that purpose, is entitled to the lateral support of the other close, the very instant when the conveyance is executed, as much as after the expiration of twenty years or any longer period."

In *Wyatt vs. Harrison* (3 Barn. & Adol. 871), Lord Tenterden said: "The question reduces itself to this: whether if a person builds to the utmost extremity of his own land, and the owner of the adjoining land digs the ground there, so as to remove some part of the soil which formed the support of the building so erected, an action lies for the injury thereby occasioned? Whatever the law might be, if the damage complained of were in respect of an ancient messuage possessed by the plaintiff at the extremity of his own land, (which circumstance of antiquity might imply the consent of the adjoining proprietor at a former time, to the erection of the building in that situation), it is enough to say in this case, that the building is not alleged to be ancient, but may, as far as appears from the declaration, have been recently erected; and if so, then, according to the authorities, the plaintiff is not entitled to recover. It may be true, that if my land adjoins that of another, and I have not by building increased the weight upon

my soil, and my neighbor digs in his soil so as to occasion mine to fall in, he may be liable to an action. But if I have laid an additional weight upon my land, it does not follow that he is to be deprived of the right of digging his own ground, because mine will then be incapable of supporting the artificial weight which I have laid upon it."

Lord Campbell, in the case of *Humphreys vs. Brogden*, before cited, states it to be law, that where a house has been supported more than twenty years, by land belonging to another proprietor, with his knowledge, and he digs near the foundation of the house, whereby it falls, he is liable to an action at the suit of the owner of the house.

See also *Smith vs. Renwick* (7 Com. Bench Rep. 515).

In *Hunt vs. Peake* (1 Hy. Johnson's Ch. Rep. 705, Vice-Ch. Stuart, 1860), the Vice-Chancellor said: "What I conceive to be settled is this, that every person in working earth on his own land, whether by surface excavations or underground pits, is bound so to work as not to cause any subsidence of the original soil of his neighbor. In other words, every man is entitled to have his land in its natural state, supported by the adjoining land of his neighbor; and this is an original right incident to his property, of which he cannot be deprived by his neighbor's operations on adjoining land."

The Vice-Chancellor also thought, that a right might be acquired by twenty years enjoyment, to a lateral support for the additional weight of a building on the land.

In *Lasala vs. Holbrook* (4 Paige's Rep. 169), the Chancellor said: "I have a natural right to the use of my land in the situation in which it was placed by nature, surrounded and protected by the soil of the adjacent lots; and the owners of these lots will not be permitted to destroy my land, by removing this natural support or barrier. Thus, it is laid down by Rolle, that I may sustain an action against a man who digs a pit on his own land so near to my lot, that my land falls into the pit (2 Rolle's Ab. 565, l. 10). But my neighbor has a right to dig a pit on his own land, if necessary to its convenient or beneficial use, when it can be done without injury to my land in its natural state. I cannot, therefore, deprive him of this right, by erecting a building on my lot, the weight of which will cause my land to fall into the pit

which he may dig, in the proper and legitimate exercise of his previous right to improve his own lot. (1 Siderfin, 667; 2 Rolle's Ab. 565, l. 5.) These principles were fully recognized in *Thornton vs. Hancock* (12 Mass. Rep. 223)."

Panton vs. Holland (17 John. Rep. 92) is also cited by the Chancellor. The law is there stated very comprehensively, that an owner may dig upon his own premises, without regard to the effect upon an adjoining messuage, unless he do so wilfully or maliciously. The question as to the right to a support of the soil in its natural state, is not noticed.

In *Farrand vs. Marshall* (21 Barbour's Rep. 409), the case is thus stated by Wright, Justice: "The parties are owners and possessors of adjoining closes, the plaintiff having acquired title from the defendant. Where the closes adjoin, the land is in its natural state. The plaintiff has laid no additional weight upon the land increasing its lateral pressure. The defendant is engaged in digging and removing the earth and clay from his close near its junction with that of the plaintiff, for the purpose of making brick. He has already excavated to the depth of fifty feet, within a short distance of the western extremity of the plaintiff's close, so as to cause the plaintiff's to crack and subside, and the exterior fences to crack and stretch apart. The defendant threatens to pursue his excavations up to the western line of the plaintiff's close, the consequence of which would be, that the plaintiff's land, losing its natural support, would subside and fall over into the pit made by the defendant's excavations."

The court held, after an elaborate examination, that a court of equity had the power to restrain a land owner from excavating or removing soil from his land adjoining the land of another, if the effect of such excavation and removal will be to cause the land of his neighbor, by reason of the withdrawal of its natural support, to fall away or subside.

The court appear to sustain the doctrine that had a building been before upon the land the case might be different.

The views of Chief Justice Bronson, in *Radcliff's Exec'rs vs. The Mayor of Brooklyn* (4 Comstock, 195), are, as to same points, examined and contested.

[c] **Support by subjacent land.**—In *Humphries vs. Brogden* (12 Queen's Bench Rep. 739, 1850), Lord Campbell said:

"We have, therefore, to consider whether, when the surface of land (by which is here meant the soil lying over the minerals) belong to one man, and the minerals belong to another, no evidence appearing to regulate or qualify their rights of enjoyment, the owner of the minerals may remove them without leaving support sufficient to maintain the surface in its natural state. The case is relieved from the consideration how far the rights and liabilities are effected by the erection of buildings, for the plaintiff claims no greater degree of support for his land, than they must have required and enjoyed since the globe subsisted in its present form."

After stating the law, as to the right to lateral support in the passages quoted (*ante*, p. 182), he proceeds: "*Pari ratione*, where there are separate freeholds under the surface of the land, and the minerals belong to different owners, we are of opinion that the owner of the surface, while unencumbered by buildings, and in its natural state, is entitled to have it supported by the subjacent mineral strata. . . . If the surface subside and is injured by the removal of these strata, the owner may maintain an action.

In *Harris vs. Ryding* (5 Meeson & Welsby, 60), the grantor of premises reserved the right to all mines, &c., with liberty to come in and dig upon the premises to get coal, &c., and to carry it away, making compensation for damages done to the premises. It was held that he was not entitled to take all the mines, but only so much as he could get, leaving a reasonable support to the surface.

In *Nichlin vs. Williams* (26 En. L. & Eq. Rep. 549), the rule was recognized, of the right of an owner to the support of a stratum of coal under his land; and it was held that the withdrawal of a part of such support gave a right of action, although no immediate damage resulted. Hence an action for such withdrawal, settled by an award and satisfaction, was held a bar to a subsequent action after damage took place.

[D] **Party Walls.**

Where the owner of land builds houses upon it, adjoining each other so as to require mutual support, there is, either by a presumed grant or a presumed reservation, a right to such mutual support, and such right is not affected by a subsequent subdivis-

ion of the property. An injunction may issue to restrain the infringement of this right.

In *Richards vs. Rose* (24 En. L. & Eq. Rep. 406), Pollock, Ch. Baron, said: "It seems to be clear, that where a number of houses are built upon a plot of ground, all the houses belonging to the same person being all built together, and each obviously requiring the mutual support of its neighbors for their common protection and security, such right of mutual support equally exists, whether the owner parts first with one house and then with the other, or with two together; the ownership of the latter being afterwards divided, either by sale, mortgage, devise, or by any other means."

In *Eno vs. Del Vechio* (4 Duer, 53; S. C. 6 Duer, 17), the following propositions were stated by the court: "1st. If the owner of two adjoining lots erects buildings upon them, with a wall partly on each, to be used as a support to both buildings, and which is necessary to furnish such support, and which is used for that purpose from the time of its erection, a conveyance of either house and lot with its appurtenances, grants an easement for the support of the house so conveyed, in so much of the wall as stands upon the other lot.

"2d. After such a grant, and a continued use of such party wall to support both buildings for more than twenty years, neither party can remove the wall, nor so deal with it as to render it an insufficient support for the other's building without his consent. If he does, he is liable to the other for the injury.

"3d. If either wishes to improve his own premises before the party wall becomes ruinous, or incapable of further answering the purposes for which it was erected, he may underpin the foundation, sink it deeper, and increase, within the limits of his own lot, the thickness, length, or height of the party wall, if he can do so without injury to the building on the adjoining lot; and to avoid such injury he may shore up and support the original party wall a reasonable time, to excavate and place a new underpinning beneath it.

"4th. But he cannot interfere with it in any manner unless he can do so without injury to the adjoining building, or has the consent of the owner of such building."

In *Partridge vs. Gilbert* (3 Duer, 184, on Appeal; 15 N. Y.

Rep. 601), it was ruled, that where the owner of adjoining houses having a common party wall, conveys the houses to different grantees, and makes the centre of the wall the dividing line of the land conveyed to them respectively, each grantee acquires an easement of supporting his building by means of the half of the wall belonging to his neighbor. This right exists so long as the wall continues to be sufficient for the purpose, and the respective buildings remain in a condition to need and enjoy the support. When this ceased to be the case, and it became necessary to take down the wall and rebuild the stores, either the interest of each proprietor in the land of the other ceased with the existence of the state of things which created it, or each was entitled to call upon the other owner to reimburse him one-half of the expense.

The Chief Justice (Denio) then remarks upon the question, whether, when the wall is ruinous so as to require being taken down, the mutual rights of the parties still subsist, and contribution for the expense of a re-construction may be enforced. He inclines to the doctrine of the Superior Court in *Sherred vs. Cisco* (4 Sandf. S. C. Rep. 480), that these mutual interests and obligations would then cease; but it was unnecessary to decide so important a practical question, as the jury had found that the wall and the old buildings were no longer fit to stand; and the defendants violated no right of the adjoining proprietors in taking down their own building, which made it absolutely necessary to take down the wall.

In *Ogden vs. Jones* (2 Bosworth, 685), a lot was conveyed of 28 feet breadth, front and rear, by express boundaries and dimensions, but the grantor excepted, and reserved to himself, &c., one-half of the westerly wall erected, or to be erected, by the grantee, or any one under him, on the westerly side of the premises, adjoining the lot of the grantor, the latter covenanting to pay half the expense of supporting such wall. The grantee erected a dwelling-house 28 feet front, with a westerly wall 12 inches in thickness. The grantor afterwards erected a dwelling-house, using the wall as a support thereof.

It was held, that the reservation and covenant did not reserve the fee in the ground on which the wall stood, nor did it give any such property in the wall as entitled the grantor to cut it away,

or undermine it, but only gave him a right to use it as a support for his adjoining building.

He could not therefore cut away the front of the grantee's house, and extend the front of his own building on the lot of the former, over the westerly line of the 28 feet, so as to present on the exterior a front extending to the centre of the party wall.

An injunction was granted preventing a grantee of the grantor from interfering with such westerly wall, in any manner, except by using it as a support for the adjoining building.

[E] **Dedication.**—The dedication of highways and streets for the passage of carriages and other conveyances, and of public squares in cities and villages, as promenades for health and exercise, arises from the acts of the owner, or from user. When established, it becomes a public right. "It is the deliberate appropriation of the land by its owner, for any general and public uses, reserving to himself no other rights in the soil than such as are perfectly compatible with the full exercise and enjoyment of the public uses to which he has devoted his property. Such an appropriation, our courts have held, will take effect without any formal deed, or any matter of record, and without any specific grantee to take the title. In respect to such an opening of land for streets and highways, the law has been clearly settled by numerous decisions here and in England, both as to the effect of the dedication itself and as to its external evidence." (Verplanck, Senator, in *Post vs. Pearsall*, 22 Wendell, 472.) The learned senator then clearly showed that these rules had been applied to public squares, commons, and springs of water. He contends that it is equally applicable to a landing place on the shore of a stream. His proposition was, however, negatived by the Court of Errors, affirming the judgment of the Supreme Court in the case.

The rule as to public places, commons, and public springs, may be stated to be, that mere prescription does not establish the right; but may be resorted to as a piece of evidence to corroborate other testimony as to an appropriation by the owner.

In *Cady vs. Conger* (19 N. Y. Rep. 256), a dedication was established from the language of an instrument of conveyance, the actual carrying out of the intended purpose, corroborated and explained by user.

In that case, the plaintiff was the owner of a house fronting on a village green, alleged to have been dedicated; and brought his action on behalf of himself and all others similarly situated. It was held that he could support the suit, there being no village corporation which might assert the general right of the public. A perpetual injunction was granted.

The following authorities relate to dedications for various public purposes. To a public square: 6 Peters U. S. Rep. 431; 2 Vermont, 480; 3 *ibid.* 521; 4 Paige, 519. To a college green: 3 *ibid.* 530. To a court-house square: 6 *ibid.* 355. To a burying-ground: 6 Hill, 407. To the reservation of a spring of water: 12 Wheaton, 583.

Maxwell vs. The East River Bank (3 Bosworth, 124), was not the case of a dedication in its technical sense, although the judge at Special Term found it to be such. It was placed at the General Term, upon the ground of an agreement for conformity in the line of building, by which an additional open space, constituting the apparent street, should continue permanently of a given increased width.

In the *Mayor, &c., vs. Stuyversant* (17 N. Y. R. 34), it was held, that no dedication of land for a public square could be implied against the heirs of the grantor, from its representation as a mere blank, undistinguished from the streets surrounding it, upon a partition map made by such heirs, and by reference to which they conveyed lots twenty years before the expiration of the period within which the election to open it was vested in the grantees of the square or their assigns, the square being then covered with buildings, and such map not professing to show a partition of all the land inherited.

A case of a similar nature is *Huttmier vs. Albro* (18 N. Y. Rep. 48). A partition was made between the owners of three lots and an alley in the city of New York, the lots all fronting upon public streets and abutting on the alley, which then was, and for years had been, used as a means of access to the rear of the lots. Deeds were executed, which referred to the alley as a boundary, and, with one exception, so described the lots as to exclude the alley from the premises conveyed.

The judge below held, that the deeds conveyed, as an incident and appurtenance to the lot itself, a right to the use of the alley-

way, as it had been and was then used. Judgment was given, that the defendant remove from it all obstructions, and refrain from interfering with the free and unobstructed use thereof.

The Court of Appeals affirmed the judgment. "Whether a right of way or other easement is embraced in a deed, is always a question of construction of the deed, having reference to its terms and the practical incidents belonging to the grantor of the land at the time of the conveyance. The intention of the parties is to be learned from these facts."

See the case before the General Term of the Superior Court, 2 Bosworth, 546. See, also, *Carpenter vs. Gwynn*, 35 Barb. 395.

I. 6. *Water privileges and rights to water.*

"The subject of a right to the streams of water flowing on the surface has been of late years fully discussed, and by a series of carefully considered judgments, placed upon a clear and satisfactory footing. It has been now settled that the right to the enjoyment of a natural stream of water on the surface belongs, *ex jure naturæ*, to the proprietor of the adjoining lands, as a natural incident to the right to the soil itself; and that he is entitled to the benefit of it, as he is to all the other natural advantages belonging to the land of which he is the owner. He has the right to have it come to him in its natural state, in flow, quantity, and quality, and to go from him without obstruction. His right in no way depends upon prescription, or the presumed grant of his neighbor. The elaborate judgment of Lord Denman in the case of *Mason vs. Hill*, in 1833 (5 Barn. & Adol. 1), reviewed most prior judgments and authorities of importance up to that date, and fully established that proposition."—(Per Lord Wensleydale, 7 House of Lords Cases, 349–380).

[A] *Surface water on defined streams.*—In the above case, the case of *Embury vs. Owen* (6 Exch. Rep. 353), is spoken of as clearly enunciating the principles respecting the rights to water flowing in definite visible channels. A reference to these and a few other authorities is therefore all of English cases that I deem necessary upon this subject.

In the first of them, *Mason vs. Hill* (5 Barn. & Adol. 1), the case was this: A, erected a mill on his own land in 1823, the former owner of which had, for twenty years before 1818, appropriated the water of a stream running through it, to the purposes

of watering his cattle and irrigating his land. At the time when the defendant's mill was erected, the then owner and occupier of the plaintiff's land gave a parol license to the defendants to make a dam at a particular place above, and to take what water they pleased from that point to their mill; which water was so taken, and returned by pipes into the stream above the spot where the plaintiff's mill was afterwards erected. The plaintiffs demolished the dam of the defendants, and the latter then erected a new one lower down, and by means of it diverted from the plaintiffs' mill at some times all the water, at others a part of it, and returned the remainder in a heated state into the stream. The court noticed, that the demolition of the first dam by the plaintiff could not give a right to the defendants to construct a new one at another place. If a wrong was done they had their action.

They proceed: "The proposition for which the plaintiff contends is, that the possessor of lands through which a natural stream runs, has a right to the advantage of that stream flowing in its natural course, and to use it when he pleases for any purposes of his own, not inconsistent with a similar right in the proprietors of the land above and below; that neither can any proprietor above diminish the quantity or injure the quality of water which would otherwise descend, nor can any proprietor below throw back the water without a license or grant; and that, whether the loss by diversion of the general benefit of such a stream be or be not such an injury in point of law as to sustain an action without some special damage, yet as soon as the proprietor of the land has applied it to some purpose of utility, or is prevented from so doing by the diversion, he has a right of action against the person diverting.

"The proposition of the defendants is, that the right to flowing water is *publici juris*, and that the first person who can get possession of the stream, and apply it to a useful purpose, has a good title to it against all the world, *including* the proprietor of the land below, who has no right of action against him, unless such proprietor has already applied the stream to some useful purpose also, with which the diversion interferes; and in default of his having done so may altogether deprive him of the benefit of the water.

"The position that the first occupant of running water for a

beneficial purpose has a good title to it is perfectly true in this sense, that neither the owner of the land below can pen back the water, nor the owner of the land above divert it to his prejudice. In this, as in other cases of injuries to real property, possession is a good title against a wrong doer; and the owner of the land who applies the stream that runs through it, to the use of a mill newly erected or other purposes, if the stream is diverted or obstructed, may recover for the consequential injury to the mill. But it is a very different question whether he can take away from the owner of the land below, one of its natural advantages, which is capable of being applied to profitable purposes, and generally increases the fertility of the soil, even when unapplied, and deprive him of it altogether by anticipating him in its application to a useful purpose. If this be so, a considerable part of the value of an estate which, in manufacturing districts particularly, is much enhanced by the existence of an unappropriated stream of water, with a fall within its limits, might at any time be taken away; and, by parity of reasoning, a valuable mineral or brine spring might be abstracted from the proprietor in whose land it arises, and converted to the profit of another."

His lordship then proceeds to examine *Bealey vs. Shaw* (6 East. 208); *Saunders vs. Newman* (1 B. & A. 258); *Williams vs. Moreland* (2 B. & C. 113), and other statements of judges or writers, and says: "None of these *dicta*, when properly understood with reference to the cases in which they were cited, and the original authorities in the Roman law, from which the position that water is *publici juris* is deduced, ought to be considered as authorities, that the first occupier or first person who chooses to appropriate a natural stream to a useful purpose, has a title against the owner of the land below, and may deprive him of the benefit of the natural flow of water."

"From these authorities, it seems that the Roman laws considered running water not as a *bonum vacans*, in which any one might acquire a property, but as public or common in this sense only, that all might drink it or apply it to the necessary purposes of supporting life; and that no one had any property in the water itself except in that particular portion which he may have abstracted from the stream, and of which he had the possession, and during the time of such possession only."

In *Embery vs. Owen* (6 Exch. Rep. 353), the plaintiffs were occupiers of a water grist mill, situate on the banks of the river Rhiew. The defendant was owner of land on both sides of that river above the mill, and the action was brought against her for diverting part of the water of the river for the purpose of irrigating certain meadows on the northern bank, which were in possession of her tenant. The water was diverted by means of an iron trough or aqueduct, placed near a waste weir, from whence the surplus of waste water was carried into the trough or aqueduct, and by it over the river into the main and floating gutters of the meadows when required for irrigation; at other times such surplus waters was discharged directly into the bed of the river from the trough by means of an iron flap or sluice in its middle. A portion of the water was lost by absorption and evaporation in the process of irrigation; the working of the plaintiff's mill, however, was not impeded; the quantity thus lost was estimated differently by the witnesses, from four per cent. to one-seventh of one per cent.

The judge left it to the jury to find, whether there was any sensible diminution of the natural flow of the water by means of the diversion, and whether the quantities of water absorbed and evaporated in the process of the defendant's irrigation were small and inappreciable quantities; intimating that the latter term might mean so inconsiderable as to be incapable of price or value. Both questions were answered in favor of the defendant.

The court observed: "The right to have a stream flow in its natural state, without diminution or alteration, is an incident to the property in the land through which it passes; but flowing water is *publici juris* not in the sense that it is *bonum vacans*, to which the first occupant may acquire an exclusive right, but that it is public and common in this sense only, that all may equally use it who have a right of access to it; that none can have any property in the water itself, except in the particular portion which he may abstract from the stream, and take into his possession, and that during the time of his possession only. But each proprietor of the adjacent land has the right to the use, first, of the stream which flows through it. This right to the benefit and advantage of the water flowing past his land is not an absolute or exclusive right to the flow of all the water in its natural state;

if it were, the argument of the learned counsel that every abstraction of it would give a cause of action would be irrefragable; but it is a right only to the flow of the water and the enjoyment of it, subject to the similar rights of all the proprietors on the banks on each side, to the reasonable enjoyment of the same gift of Providence. It is only, therefore, for an unreasonable and unauthorized use of this common benefit that an action will lie: for such an use it will."

The passage from 3 Kent's Comm., pp. 439-445, is cited, as stating the law most perspicuously.

The opinion of the Vice-Chancellor, in *Wright vs. Howard* (1 Sim. & St. 190), is pronounced by Chief-Justice Denman (5 Barn. & Adol. 1) to be a luminous judgment. The Vice-Chancellor said: "The right to the use of water rests on clear and settled principles. *Prima facie*, the proprietor of each bank of a stream is the proprietor of half the land covered by the stream; but there is no property in the water. Every proprietor has an equal right to use the water which flows in the stream, and, consequently, no proprietor can have the right to use the water to the prejudice of any other proprietor. Without the consent of the other proprietors who may be affected by his operations, no proprietor can either diminish the quantity of water which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above. Every proprietor who claims a right either to throw the water back above, or to diminish the quantity of water which is to descend below, must either prove an actual grant or license from the owners affected by his operations, or an uninterrupted enjoyment of twenty years; which term of twenty years is now adopted, upon a principle of general convenience, as affording conclusive presumption of a grant. It appears to me that no action will lie for diverting or throwing back water, except by a person who sustains an actual injury; but the action must lie at any time within twenty years, when the injury happens to arise, in consequence of a new purpose of the party to avail himself of the common right."

See, also, *Tyler vs. Wilkins*, 4 Mason's Reports, 398.

In *Lampman vs. Milks* (Court of Appeals, 21 N. Y. Rep. 505), it was held that, where the owner of land across which a stream flows, has diverted it through an artificial channel, so as to retrieve

a portion of the land formerly overflowed, which he then conveys—neither he, nor his grantees of the residue, can return the stream to its ancient bed, to the damage of the first grantee. Such benefits, not naturally attached to the premises purchased, but previously conferred upon it at the expense of the other land of the grantor, do not depend upon covenant, but remain attached to the tenement conveyed, unless the right to subvert them is expressly reserved.

In *Bellinger vs. The New York Central Railroad* (23 N. Y. Rep. 42), it was held that the obstruction of a water-course gave, of itself, a right of action, without special damage. But it was also held that, where a company, acting under legislative authority, caused, by erections made with reasonable care, a consequential damage to an owner, the latter could not recover for such damage. *Radcliff's Executors vs. Mayor of Brooklyn* (4 Comstock, 195), is cited to this point.

[B] **Subterranean water.**—The subject of the law upon subterranean water, is fully discussed and stated in the late case of *Chasemore vs. Richards* (7 House of Lord's Cases, 349, 1859). One of the lords, in expressing his opinion, stated that the house was greatly indebted to the learned judges for the admirable reasoning by which they appear to have removed all doubt upon one of the most important questions that ever came under the consideration of a court of justice.

The statement of the decision in the head note is this: Where A., a land-owner and mill-owner, who had for above sixty years enjoyed the use of a stream which was chiefly supplied by percolating underground water, lost the use of the stream, after an adjoining owner had dug on his own ground an extensive well, for the purpose of supplying water to the inhabitants of the district, many of whom had no title as land-owners to the use of the water; it was held that A. had no right of action." I cite some of the most important passages at length.

"The law respecting the right to water flowing in definite, visible channels, may be considered as pretty well settled by several modern decisions, and is very clearly enunciated in the judgment of the Court of Exchequer in *Embery vs. Owen* (6 Exch. Rep. 353).¹ But the law, as laid down in those cases, is inappli-

¹ Also reported 4 En. L. & Eq. Rep. 466.

cable to the case of subterranean water not flowing in any definite channel, nor, indeed, at all, in the ordinary sense, but percolating or oozing through the soil, more or less, according to the quantity of rain that may chance to fall. The inapplicability of the general law respecting rights to water to such a case, has been recognized and observed upon by many judges, whose opinions are of the greatest weight and authority." (Wightman, Justice, delivering the opinion of the judges.)

"The law as to water flowing in a certain and definite channel has been settled by a series of decisions, in which the relative rights and duties of riparian proprietors have been carefully adjusted and established. The principle of these decisions seems to me to be applicable to all water flowing in a certain and defined course, whether in an open and visible stream, or in a known subterranean channel; and I agree with the observation of Chief Baron Pollock, in *Dickinson vs. The Grand Junction Canal Company* (7 Exch. Rep. 300), that if the course of a subterranean stream were well known, as is the case with many which sink underground, pursue for a short space a subterraneous course, and then emerge again, it could never be contended that the owner of the soil under which the stream flowed could not maintain an action for the diversion of it, if it took place under such circumstances as would have enabled him to recover, had the stream been wholly above ground. But it appears to me that the principle which applies to flowing water in streams or rivers, the right to the flow of which, in its natural state, is incident to the property through which it passes, are wholly inapplicable to water percolating through underground strata, which has no certain course, no defined limits, but which oozes through the soil in every direction in which the rain penetrates. There is no difficulty in determining the rights of the different proprietors to the usufruct of the water in a running stream; whether it has been increased by floods or diminished by drought, it flows on in the same ascertained course, and the use which every owner may claim is only of the water which has entered into and become a part of the stream. But the right to percolating underground water is necessarily of a very uncertain description. When does this right commence? Before or after the rain has found its way to the ground? If the owner of the land through which the

water filters cannot intercept it in its progress, can he prevent its descending to the earth at all, by catching it in tanks or cisterns? and how far will the right to this water supply extend?" (Lord Chelmsford's opinion.)

He cites, also, the following passage from Baron Alderson's opinion in *Broadbent vs. Ramsbotham* (11 Exch. Rep. 615): "No doubt all the water falling from heaven and shed upon the surface of a hill, at the foot of which a brook runs, must, by the natural force of gravity, find its way to the bottom, and so into the brook; but this does not prevent the owner of the land on which this water falls from dealing with it as he may please, and appropriating it. He cannot, it is true, do so if the water has arrived at and is flowing in some natural channel already formed. But he has a perfect right to appropriate it before it arrives at that channel."

"These cases apply to the right to surface-water, not flowing in any defined material water-course. But, of course, the principles they establish are equally, if not more strongly, applicable to subterranean water of the same casual, undefined, and varying description."

The language of Chief Justice Tindal, in *Acton vs. Blundell* (12 Meeson & Welsby, 353), is quoted with approbation. "We think the present case is not to be governed by the law which applies to rivers and flowing streams; but rather falls within that principle which gives to the owner of the soil all that lies beneath the surface; that the land immediately below is his property, whether it is solid rock, or porous ground, or venous earth, or part soil part water; that the person who owns the surface may dig therein, and apply all that is there found to his own purposes; and that if, in the exercise of this right, he intercepts or draws off the water collected in his neighbor's well from underground springs, it is *damnum absque injuria*, which cannot become the subject of an action."

In that case of *Acton vs. Blundell*, a landowner who was carrying on mining operations in the usual way on his own land, drained the water from the well of his neighbor. It was held that the latter had no right of action against him. .

The question was in substance this: whether the right of enjoyment of an underground spring, or of a well supplied by such

underground spring, was governed by the same rule of law as that which applies to and regulates a water course flowing on the surface.

It was observed: "It is scarcely necessary to say, that we intimate no opinion whatever as to what might be the rule of law, if there had been an uninterrupted use of the right for more than the last twenty years; but confining ourselves strictly to the facts stated in the bill of exceptions, we think," &c. The court then proceeds with the observations above quoted.

The doctrine of these authorities is recognized in the case of *Chatfield vs. Wilson* (28 Vermont Reports, 49).

In *Haight vs. Rice* (Court of Appeals, 21 N. Y. Rep. 241), it was held that no acquiescence short of twenty years, could repel the presumption that the diversion of a water course was adverse to the rights of a riparian proprietor, or would authorize the presumption of a grant or license.

[C] **Falling Water.**—I apply this term to water falling from the clouds, and not yet shed upon the earth; or, if it has reached it, not absorbed into any sheet or stream. The passages cited from the case in the House of Lords, and from *Broadbent vs. Ramsbotham* (*ante* p. 197), establish the right of the owner of the land over which it descends, or through which it flows, to intercept and appropriate it.

[D] **Litoral rights on navigable streams.**—The following propositions are the settled law in our State.

The State has the title to all the navigable waters within its borders, subject only to the jurisdiction delegated to Congress in the Constitution of the United States, for the regulation of commerce.

The waters are, it seems, navigable wherever the tide ebbs and flows; and the principle extends to rivers, so far as the rise and fall is governed by oceanic tides, although there be no actual current up such rivers, and the water be not salt or brackish.

The State in its sovereign character owns the bed of navigable streams to high-water mark; the right of a riparian owner is subservient to the power of the State to abridge or destroy it.

The riparian owner may use the water passing or adjoining his own land for his own advantage, so long as he does not impede the navigation. But the State may, as proprietor of the

waters, grant them, or any interest in them, to an individual. No restriction exists, unless it arise under the Constitution of the United States. (*The People vs. Tibbetts*, 19 N. Y. Rep. 523.)

In *Gould vs. The Hudson River Railroad* (2 Selden's Rep. 522), it is held that the owner of land adjoining a navigable river, has no private right or property in the waters of the river, or in the shore between high and low-water mark; and, therefore, is not entitled to compensation from a railroad company which constructs, under a grant of the legislature, a railroad along the shore between high and low-water mark, so as to cut off the communication between his land and the river, otherwise than across the railroad.

In *The People vs. Tibbetts* before mentioned, this case and its doctrine was recognized as established law.

The State did not merely succeed to the right of the Crown, but to the whole power of the Crown and Parliament, subject only to the Constitution of the United States.

The right to navigate the public waters of the State, and to fish therein, is a public right, belonging to the people at large. The Legislature, as the representative of the public, may restrict and regulate the exercise of those rights, in such manner as may be deemed most beneficial to the public.

A riparian proprietor on the bank of the Hudson River had no better right to the use of the soil, between high and low-water mark, than any other person. If he built a wharf there, it might be treated as a purpresture, and demolished by direction of the Legislature.

It is not every opening into the land affected by the tide, and at times filled with salt water, which is to be deemed navigable in the common-law sense. It must be something which is useful for some purpose of trade or agriculture.

This position is fully stated and decided in *Rowe vs. Granite Bridge Corporation* (21 Pickering R. 344). The case arose upon a bill for a perpetual injunction against an obstruction in a salt-water creek. The relief was denied; the creek could not be considered a stream navigable for any useful purpose of trade or agriculture. The plaintiffs were owners of a tract of salt marsh, through which a creek had run. The defendants, under an act of incorporation, had power to build a road and bridge over the "Neponset," across this tract of marsh. The Chief Justice said: "It

was not every creek in which a fishing skiff or a gunning canoe can be made to float at high water, which is deemed navigable. It is not the possibility of its being used under some circumstances, as at extraordinary high tides, but it must be generally and commonly useful to some purposes of trade or agriculture."

So, in *Glover vs. Powell* (2 Stockton N. J. Rep. 211), it was declared, that it was not every ditch navigable for small boats, at certain periods of the tide, which is a navigable water; but the Legislature is the judge when it shall be considered and protected as such, or obstructed. See also *The American River Water Co. vs. Amsden*, 6 Calif. Rep. 443.

The adjacent proprietors are often said to possess some rights as against others, though not as against the State, by virtue of their ownership. In our State, however, this right is nothing more than what they possess in common with all other citizens. Without an express grant, there is no exclusive right of fishing in the adjacent waters, nor of bathing. The drawing of nets, where the owner's upland is used, is a trespass on his property. He cannot prevent the mere act of fishing in the waters by another.¹

Alluvion, &c.—But the shore proprietor has an advantage in the acquisition of what is termed alluvion, derelict land, or formation of an island. The general principles are as applicable to navigable waters as to other streams.

The rule is, that the acquisition by alluvion is only when the gain is imperceptible—so slow and secret, that it cannot be perceived how much is added in each moment of time. This rule is recognized by the Court of Appeals of New York, in *Halsey vs. McCormick*, 18 N. Y. Rep. 147. See Angell on Tide Waters, p. 249.

In the case referred to, the Judge who delivered the opinion thought that there was no ground for a distinction, whether the accretion arose from natural or artificial causes; but the point did not arise. In *Adams vs. Frothingham*, 3 Mass. Rep. 352, it was ruled, that land formed by alluvion, from natural causes, or from a union of natural and artificial causes, belongs to the owners of the shores.

The interpretation of the word "imperceptible" is to be found

¹ *Hooker vs. Cummings*, 20 Johns. Rep. 90; 2 Selden, 541.

in the case of *The King vs. Lord Yarborough*, 3 Barn. & Cresswell, 91; 2 Bligh. Rep. N. S. 147.

Sea-weed, thrown up by the sea, belongs to the adjoining owner.¹ But not if it grows or accumulates below low-water mark.²

The soil which is left dry by a recession of the water, continues to belong to the State, because it belonged to it when covered by water.³ But if an individual had acquired the title by a grant, the relict land would, of course, belong to him. The same rule here applies as in the case of alluvion. If the reliction is slow and imperceptible, the adjoining owner has the benefit of it. (*Rex vs. Lord Yarborough*, 3 Barn. & Cress. 91.)

The rule is similar as to islands formed by the desertion of the water, or the collection of sand and other substances. (Angell on Tide Water, p. 267, and cases.)

If at the time of a grant bounding on a stream, it was navigable, the rights of the grantee will continue the same, and no greater, although, by the operation of artificial constructions—a dam, for example—the stream has ceased to be navigable. (*The People vs. Tibbetts*, *ut supra*.)

[E] **Litoral rights on innavigable streams.**

The phrase “innavigable” is here used in the strict sense of the term, viz., waters not influenced by the oceanic tides. Such is the sense in which our Court of Appeals has used the term.⁴

It will at once be seen that, in this acceptation, those great fresh-water rivers, and masses of water, which are to be found in the interior of our country, are innavigable. Yet commerce has covered them with thousands of vessels.

Accordingly great questions soon arose as to rights in these waters, and the rights attached to the ownership of lands upon their banks.

¹ *Emans vs. Turnbull*, 2 John. Rep. 313; *Phillips vs. Rhodes*, 7 Metcalf, 322.

² *Chapman vs. Kimball*, 9 Con. Rep. 38. See *Lowe vs. Govett*, 23 Eng. Com. Law Rep. 263.

³ *Ibid*.

⁴ The meaning of this term—the influence of oceanic tides—is well shown in the cases of *Peyroux vs. Howard*, 7 Peters' U. S. Rep. 324, and *Lapish vs. The Bangor Bank*, 8 Greenleaf (Maine) Rep. 85.

In our State, the case of the Commissioners of the Canal Fund *vs.* Kempshall (26 Wendell, 404), is the leading authority. The question related to rights on the Genesee River. It was held, that the bed of fresh-water rivers, to the middle of the stream, belongs to the owners of the adjacent banks. If navigable (in the sense of bearing vessels for trade), the rights of the owners are subject to the servitude of the public interest for passage or navigation. The owners are, however, entitled to the usufruct of the waters flowing in the rivers, as appurtenant to the fee of the adjoining banks; and for an interruption, even by the exercise of the right of eminent domain by the State, compensation should be made.

The complete right to the enjoyment of the waters for milling, or any other purpose to which water or its mechanical power is applicable, is appurtenant to the ownership of the soil and banks. The only limitation to that right is, that the waters shall not be used, diverted, or detained, so as to infringe upon the same and equal rights of use and enjoyment of other fluvial or riparian proprietors.

In Child *vs.* Starr (4 Hill's Rep. 369), Chancellor Walworth considered that the Commissioners of the Canal Fund *vs.* Kempshall settled that the common-law rule prevailed as to streams above tide-water; that the riparian proprietor was *prima facie* the owner of the *alveus* or bed of the river, adjoining his land, to the middle or bed of the stream; that is, where the terms of his grant did not show that he was limited.

In Lorman *vs.* Benson, in the Supreme Court of Michigan, January, 1860, the subject was extensively examined.

The question related to the rights of riparian proprietors on the water communication, known as the Detroit River. It was held—

1. That there were no tide-waters in the State, and, therefore, no waters which, by the technical meaning of the term "navigable" at common law, would come within it. But there were many thousand miles of external boundary waters, which are open to navigation, in the popular sense, and many interior streams valuable for public convenience and passage.

2. The inquiry was, whether the circumstances of the country required the common-law rule to be so modified as to apply the

doctrines belonging to tide-waters, navigable in the common-law sense, to those waters which were beyond the tidal influences.

3. The distinction known at the common law between tideless and tidal streams was adverted to, and commented upon. In each kind of stream, the rights of navigation were the same, and so far the public at large had no interest whatever in the question of ownership of the bed of the water.

4. All rivers of sufficient capacity for useful navigation were public rivers, and subject to the general rights of citizens, like highways. And the adjoining owners had the same rights as in other fresh-water streams.

The rule in Mississippi appears to be, that the rights of owners, whose property bounds upon the large public rivers, are subordinate to the rights of the State to use and appropriate such streams to the public good in promotion of navigation. While the right of such owners may exist as against any interference by private persons, it cannot be admitted as to the paramount jurisdiction of the State. The State having power to improve the navigation of her rivers, may judge of the expediency of doing so, and may execute, and provide for executing, such works of public improvement. (*Commissioners of Homochito River vs. Withers*, 29 Mississ. Rep. ; 7 Cushing, 21.)

In Iowa it is held, that the proprietor of land upon the bank of the Mississippi River does not own to the middle of the channel, nor to low water, but to high water only, that is, to the edge of the bank ; and the whole bed of the river is in the public. (*Dwight vs. Keokuk*, 4 Iowa Rep. 199.)

The distinction between navigable and other streams, and the practical results of the distinction, are well stated in the case of *Stuart vs. Clark* (2 Swanston Tennessee Rep. 9): "The common-law criterion of a navigable stream is the flow and reflux of the tide ; the civil-law criterion is the capability and suitableness of the stream for the purposes of navigation in the ordinary state of the water. In Tennessee the civil-law criterion has been adopted. But in all other respects the principles of the common law, regulating and defining the rights of the public and of the riparian owners, are unchanged.

"A river is navigable in the ordinary acceptance of the term,

when it is of sufficient depth naturally for valuable floatage, such as rafts, flat-boats, and vessels of light draft.

“If a river be navigable in the legal sense (*influenced by the tides*), the soil covered by the water, as well as the use of the stream, belong to the public. If it be navigable only in the ordinary sense, the ownership of the bed of the stream is in the riparian proprietors, and the public have an easement therein for the purposes of transportation and commercial intercourse. If the stream be so shallow as to be unfit for such purposes of transportation and commerce, the right both of property and use are wholly and absolutely in the owners of the adjoining land.”

A similar rule prevails in Wisconsin. (*Walker vs. Shepardson* (4 Wisconsin Rep. 486.)

Fishing.—A very important distinction in relation to streams of the character now considered, exists in our State. The adjoining proprietors have the exclusive right of fishing. This was decided in *Hooker vs. Cummings* (20 Johns. Rep. 90). I know of no case impeaching this authority, or modifying the rule.

The rights of proprietors of the adjacent land, growing out of alluvion, derelict, or the formation of islands, is the same in relation to streams of the nature now considered, as to those strictly navigable. See *ante* p. 200.

[F] **Ferries.**

In the work of the author upon the Rights of the Corporation of New York as Proprietors (vol. 2, p. 155), a large number of cases were examined, and the following propositions deduced, as best supported by authority.

Ferries can be granted at the common law by the sovereign power, and riparian proprietors are not, by virtue of their possession, entitled to the ferry franchise.

The statute of New York (1 R. S. 526, § 23), requiring that the license be first offered to the owner of the lands through which the adjoining highway runs, recognized the common law rule.

The grant, unless limited by some general law, or by the terms of the grant itself, is necessarily exclusive to the extent of the privilege conferred. The right cannot be taken back or transferred to another, until the public interests or welfare shall de-

mand its resumption, and provision shall have been made for just compensation to the owner.¹

The State exercises the right, either by empowering a particular body to grant a license to keep a ferry, or by an express grant of a ferry.

The former implies no transfer of property to the grantees of the power. The latter imparts a right of property more or less exclusive or restricted, according to the terms of the grant.

An express grant with fixed defined limits, is necessarily exclusive within those limits.

The implication in grants from a sovereign is against the grantee. The language is to be strictly construed. But with this qualification the grant of a right to, or to establish, ferries from one point on a river to another, with words of perpetuity, or their equivalent—without restriction, and without a reservation of a power over it, is as absolute a grant of property as a patent for a tract of land.

Where the limits are not fixed, the question, what shall be deemed an unwarrantable interference with vested rights, and what a just exercise of a necessarily reserved power, must depend on the facts attending each particular case.

[G] *Agreements—acquiescence.*

If the parties' rights and relations to the use of water are clearly fixed by contract, and one of the parties commits acts in violation of the contract, an injunction may be issued without regard to the question of damage or injury. The court will not consider the proposition that the change is more beneficial to the plaintiffs.

Thus in *Dickenson vs. The Grand Junction Canal Comp.* (19 En. L. & Eq. Rep. 287), a contract was entered into between a canal company and the plaintiffs, owners of paper mills, as to the mode of the enjoyment of the water, by which the canal and the mills were supplied. The company did acts in violation of the contract. Held, that it was no answer to a bill for a perpetual injunction to say, that the acts would not be injurious, or would

¹ See *Benson vs. The Mayor*, 10 Barbour, 223. *Mayor vs. Benson*, cited *Davies'* Ed. Laws, Appendix, 1264. *The People vs. The Mayor*, 32 Barbour, 102.

be even beneficial to the plaintiffs. The court allowed an injunction although no evidence of actual damage was given.

The comments upon this case, which are to be found in *Chesmore vs. Richards* (7 House of Lords' Cases, 349), do not affect the above proposition. On the contrary, it is stated that the decision could be rested upon the breach of the covenant.

In *Wells vs. Chapman* (4 Sandf. Ch. Rep. 313; 13 Barbour, 561), a raceway had been built at the joint expense of coterminous owners of mills, and there was a covenant that one should use water for a paper mill, and for no other purpose. Held, that the party could not convert it into a cotton mill, and retain the easement; but could be restrained to the use of the water for a paper mill.

Acquiescence for a period of time in the use of water, which might have been prohibited if promptly applied for, on the ground of its polluting the stream as it reached the plaintiffs, and did an injury to them, is an answer to an application for an injunction.

In *Wood vs. Sutcliffe* (8 En. L. & Eq. Rep. 217), an injunction was denied in a strong case of pollution of the water, because from 1845 to 1850 the defendant had been allowed to construct and use his dye works, without the plaintiff's interference.

To a similar point is the *Roehdale Canal Comp. vs. King* (7 En. L. & Eq. Rep. 208; 21 *ibid.* p. 177).

So acquiescence in the diversion of water for upwards of three years will be a ground for refusing an injunction until the right is established at law.

This was held, in *Reid vs. Gifford* (6 Johnson Ch. Rep. 19), where the plaintiff had been in possession of a mill and water works at the outlet of a lake, for over twenty years, and the defendant had made a tunnel five years before bill filed, by which he drew off the water to his own mill erected below, and deprived the plaintiff of the use of the water sufficient for his own mill. The chancellor relied upon *Weller vs. Smeaton* (1 Cox. Ca. 102).

So in *The Water Lot Co. vs. Bucks* (5 Geor. Rep. 576), in a conveyance by A. to B., the latter was restricted to the privilege of erecting and running a saw mill or saw mills on the premises. After B. had incurred considerable expense in the construction of a building to be used for another purpose, the court refused to

enjoin him, no sufficient excuse being given for the plaintiff's delay in applying.

In *Carlyon vs. Lovering* (40 En. L. & Eq. Rep. 448), the court say: "The plaintiff, as a riparian proprietor, has the right to have the water of his natural stream run through his land in its accustomed purity, without being polluted by any riparian proprietor or others higher up the stream, but that right he may abandon, by allowing a user of twenty or forty years, or he may grant the privilege to an owner higher up the stream for his advantage, of invading that right to the detriment of the water flowing through the plaintiff's land. We can see no reason why such a privilege, though injurious to the plaintiff to a great extent, might not be granted. In the case of *Wright vs. Williams* (1 Meeson & Welsby, 77), pleas of a similar kind as the present were held good on demurrer. The privilege was plead as a prescriptive right, and was held also good as a local custom."

Sampson vs. Hoddenott (38 En. L. & Eq. 241), was as follows: "The plaintiff had immemorially enjoyed the benefit of irrigating certain of his meadows with the water of the river Teis, subject, however, to the right of the miller at Westmill to detain the water for the use of his mill. Although the natural flow of the river was prevented by the exercise of this right, yet the water was allowed to come down at such times as that the plaintiff was enabled to irrigate his meadows effectually. But the defendant had, for the purpose of irrigating his own adjacent land, diverted the water after it had passed the mill, and before it reached the plaintiff's meadows. Although the quantity which finally reached the plaintiff's meadows was not sensibly diminished, yet the effect was that the water was detained by the process of irrigation, and did not arrive till so late in the day that the plaintiff was deprived of the power to use it fully. The question was, whether such a diversion and detaining of the water was actionable.

"It appears to us, that all persons having lands on the margin of a flowing stream have by nature certain rights to use the water of that stream, whether they exercise those rights or not, and that they may begin to exercise them whenever they will. By usage they may acquire a right to the use of water not justifi-

fied by their natural rights; but such acquired right has no operation against the natural rights of the land owners higher up the stream, unless the user by which it was acquired affects the use that he himself has made of the stream, or has power to use it, so as to raise the presumption of a grant, and to render the tenement above a servient tenement. The question between the parties is reduced to this single point: Has the defendant used the water as any riparian proprietor may do, or has he gone beyond that?"

In *Thomas vs. Brackney* (17 Barbour Rep. 654), the defendant, owning a tannery, threw large quantities of bark into the stream, which floated down into the plaintiff's pond below, filling his race, getting into his flume, and injuring his grist mill. It was considered that the question of a reasonable or unreasonable use of the water was for a jury.

[H] **Interference by injunction.**

The general jurisdiction of a court of equity to interfere by injunction in these cases of water rights, is asserted in the courts of New York, in the cases of *Gardner vs. The village of Newburgh* (2 John. Ch. Rep. 165), *Arthur vs. Case* (1 Paige, 447), *Belknap vs. Trimble* (3 Paige, 577), and *Olmsted vs. Loomis* (5 Selden, 423).

I avail myself of an abstract of the points involved in the three first cases, made by Justice Parker in *Olmsted vs. Loomis*.

"It is not necessary to allege in terms that the threatened injury will be great or irreparable, if it is apparent from the facts set forth, that such must be the effect, nor is it necessary in such a case first to establish a right at law. In *Gardner vs. The Village of Newburgh*, it was decided, that the Court of Chancery had a concurrent jurisdiction with courts of law, in a case of private nuisance by diverting or obstructing an ancient water course, and might issue an injunction to prevent the interruption, though the plaintiff had not established his title at law; and Chancellor Kent said: The foundation of jurisdiction in such a case is the necessity of a preventive remedy, when great and immediate mischief or material injury would arise to the comfort and enjoyment of property. In that case, an injunction was granted on the grounds that the right to the use of the stream of which the plaintiff was in actual possession, had been immemorially en-

joyed, and that the plaintiff would receive immediate and great injury, by the suspension of all those works on his land which were set in operation by the water.

“In *Arthur vs. Case* (1 Paige, 447), it was held that where hydraulic works were erected on both sides of a private stream, the owners of the works were each entitled to an equal share of the water; and that, if the owner of the mills on either side attempted to deprive the other of the use of his share of the water, of which he had been in the quiet enjoyment, and thus to destroy his mills, an injunction would be granted, as the injury might be irreparable. In *Belknap vs. Trimble* (3 Paige, 577), the complainants were the owners of different mills situated upon the same stream, which mills depended upon the particular use of the water of a pond at the head of the stream, for the running thereof, and such mill owners had been in the uninterrupted use of the water in a particular manner, for more than twenty years. It was held that the Court of Chancery had jurisdiction to establish their rights to such use of the waters of the pond, and to restrain the defendant from disturbing them in the enjoyment thereof. It was decided in that case, that where different mill owners have a common right to an artificial use of water for their respective mills, the Court of Chancery had jurisdiction so to regulate the common use of the water as to preserve the rights of each.

“The cases where a Court of Chancery has refused to entertain jurisdiction, and has sent a plaintiff to a court of law for relief, are, where the rights interfered with have not been long previously enjoyed, as in *Van Bergen vs. Van Bergen* (3 John. Ch. Rep. 282), or where the act of diversion complained of took place more than three years before the bill filed, as in *Reid vs. Gifford* (6 John. Ch. Rep. 19). See, also, 1 Cox Ca. 102; *Brown’s Case*, 2 Vesey, 214.”

In *Olmsted vs. Loomis* (5 Selden, 423, reversing the Supreme Court in 6 Barbour, 153), an agreement (notwithstanding certain ambiguous and seemingly inconsistent language) was construed to define the quantity of water granted, and the quantity retained or reserved by the grantor, and not to limit the mode or purposes for which the water was granted or reserved. The owner of land—of a race way through it—and of a forge for the

manufacture of iron situate at the lower end of the race, granted a part of the land, "with the privilege of digging from the head of said race to said land, for the purpose of carrying water sufficient to carry an oil mill"—the grantees "to have the privilege of the water that is not wanted for a forge and two blacksmith's bellows."

The bill was filed by one making title under the grantor, for an injunction on the ground of the erection of a paper mill, and the excessive use of the water by the defendants.

The court below dismissed the bill on the ground of there being a complete remedy at law. The Court of Appeals reversed the decision, holding that the jurisdiction of a Court of Chancery was well established. Ruggles, Justice, notices the superior advantages of settling the complicated questions as to the quantity of water each party was entitled to, by a reference, instead of a jury.

The judges agreed that there was a concurrent remedy at law and in chancery, in cases of this description, and that it was not necessary first to establish a title at law.

See further *The Winnepesogee Lake Co. vs. Walter* (9 Foster, 433), and *Dwindle vs. Veazie* (44 Maine, 167).

The French Law is so clear and comprehensive upon the important subject of water rights, that I have thought a translation of Touillier's masterly dissertation upon it, would be of service to the profession. It will be found in the Appendix A.

I. 7. Covenants relating to real property.

[A] *As to mode of using.*

If there is a plain agreement between parties as to the manner of using real property, the breach of that agreement may, in general, be enjoined; and the court will not listen to any considerations as to the advantage or utility of the change.

In *Steward vs. Winters* (4 Sandf. Ch. Rep. 589), a lease of a store contained a clause that it should be occupied for the regular dry good jobbing business, and no other. The lessee commenced selling goods at auction. The bill contained allegations that other tenants of the complainant were annoyed by the auction sales, and that they were injuriously affecting his interests in respect to other tenements. The Vice-Chancellor had no doubt that

the business of selling goods at auction was prohibited by the lease. He observed: "It is said, that the remedy at law for damages is adequate; and that so far from there being an irreparable injury by the continuance of the breach of the covenant, it is shown that there can be no injury at all.

"I apprehend we are not to regard the subject in the manner indicated by the latter proposition. The owner of land selling or leasing it, may insist upon such covenants as he pleases, touching the use and mode of enjoyment of the land; and he is not to be defeated, when the covenant is broken, by the opinion of any number of persons, that the breach occasions him no substantial injury. He has a right to define the injury for himself, and the party contracting with him must abide by the definition."

As to the objection that there was an adequate remedy at law, he said: "I think that, in a case where the parties, by an express stipulation, have themselves determined that a particular trade or business conducted by the one will be injurious or offensive to the other, and there is a continuing breach of the stipulation by the one, which this court can perceive will be highly detrimental to the other, and it is manifest that the extent of the injury is difficult to be ascertained or measured in damages, it is the duty of the court to restrain further infractions of the covenant, thereby preventing a multiplicity of suits at law, and at the same time protecting the rights of the complainant.

In *Howard vs. Ellis* (4 Sandf. Supr. Ct. Rep. 369), the case was of a lease to a party of a building, with a covenant that it should not be used for any other purpose than a jewelry and fancy goods store. It being held, on the facts, that a party who got into possession stood in the same situation as the lessee, an injunction was granted restraining the use of the tenement as a hat store.

The case of *Seymour vs. McDonald* (4 Sandf. Ch. Rep. 502) may also be cited to this point. The owner of two adjoining rural lots, bounding on a river, and erecting a house on one for his own use, sold the other for a like purpose. The grantee covenanted that he would not use the lot in a way or for any business which might be in any manner offensive to the occupant of the adjoining property, or that would tend to deteriorate or lessen its value, and would not use it for a stone quarry. The defend-

ants were building a wharf on their lot, and a railway to it from a stone quarry of their own, the wharf being but 200 feet distant from the complainant's windows. It was held to be offensive within the covenant, and restrained. The facility of landing nocturnal debauchees was also dwelt upon.

So, in *Barron vs. Richards* (3 Ed. Ch. Rep. 96; on appeal, 8 Paige, 351); the owner of a block of ground in New York divided it into lots, and sold them from time to time to different individuals, and the conveyances of the lots contained mutual covenants between the grantor and grantees respectively against the erection of any livery-stable, slaughter-house, glue-factory, &c., upon any part of the lots conveyed, or any other manufactory, trade, or business, which might be any wise offensive to the neighboring inhabitants. It was held that the covenants in the deeds of the different lots were for the mutual benefit and protection of all the purchasers of lots in the block; and, although the complainant could not maintain a suit at law on the covenant in his own name, and would, perhaps, be only entitled to nominal damages if the suit was brought in the name of Mercein, this court could give full effect to the covenant by a suit in the name of the party for whose benefit and protection the covenant was intended. The covenant in the deed to the defendants operated in favor of the neighboring owners and inhabitants. The use of the lot as a coal-yard was, upon the allegations of the bill, held to be offensive. The case arose on demurrer.

See, also, *Dickerson vs. The Grand Junction Canal Co.*, 19 En. L. & Eq. Rep. 287.

In *Mann vs. Stephens* (15 Simons' Rep. 377), it was held that although a covenant did not run with the land, so that an assignee was not be affected by it, yet, if he had at the time of his purchase notice of the covenant, equity would restrain him from violating it.

A., being seized of a house, and also of a piece of land, sold the house to B., with a covenant that no building should be erected on the land; afterwards he sold the land to C., and took a counter-covenant from him. The house became vested in D., and the land in E.; but E. had notice of both covenants. E. was restrained from building, in breach of the original covenant.

In *Piggott vs. Piggott* (1 John. Chy. Cases, 341, before Vice-

Chancellor Stuart, 1859), there was a covenant in certain building leases, that the lessee should not put up any buildings within a specified distance from other buildings, comprised in the same lease. The lessee made sub-leases of the latter buildings, assuring the parties that there could be no erections within the specified distance, as he was under a restriction in the lease he held. He afterwards surrendered his own lease, and took a new one, omitting the covenant of restriction. He then commenced erecting within the space pointed out. It was established, and by parol testimony, that he had given the assurances in question. An injunction was allowed.

[B] **Affirmative and negative covenants.**

There is a series of cases in which the question has arisen whether, when there are affirmative covenants and negative covenants in the same instrument, and the former cannot be enforced, the breach of the latter may, in any circumstances, be restrained.

Of this description are the cases of *Gervais vs. Edwards* (2 Drury & Warr. 80); *Hills vs. Croll* (2 Phillips, 60); *Dietrichsen vs. Capburn* (2 Phillips, 52); *Rolfe vs. Rolfe* (15 Simons, 88); and *Lumley vs. Wagner* (13 En. L. & Eq. Rep. 252).

It appears to be settled by the weight of authority, that where the contract contains covenants to do certain acts, and to abstain from doing certain other acts, the court has jurisdiction to restrain the breach of the negative covenants, although there may not be jurisdiction to specifically perform the affirmative covenants. But in such cases the court will decline to interfere, where the jurisdiction cannot be beneficially exercised, as in a case where the consideration for the negative covenant of the one party is the affirmative covenant of the other party, which latter the court cannot specifically perform.

This is the decision in *Lumley vs. Wagner*, in 1852, the last case I have met with.

Mr. Drewry, in his supplement to his work on Injunctions (p. 64), thinks that such was the result of the cases cited by him down to 1849.

The case of *Rolfe vs. Rolfe* (15 Simons, 88), will illustrate the rule as thus stated. Referring to certain cases which had been cited, the Vice-Chancellor said: The bills in the cases cited asked for the specific performance of an agreement, and injunctions

were sought as only ancillary to that relief; but the bill in the present case asked merely for an injunction. The agreement consisted of two distinct parts: one by William Rolfe, not to carry on the business of a tailor within a certain distance from the *Standard*, on Cornhill; the other by Francis, to employ William as a cutter, and pay him a certain amount, as long as he should carry on the business, and William should conduct himself diligently and faithfully. The court certainly could not enforce this latter part of the contract, for Francis could put an end to it when he pleased.

The injunction was granted to restrain William from carrying on the business within the prohibited district, either alone or with any other person.

[c] **Building covenants.**

Another class of cases relates to what are termed building covenants running with the land; such as covenants between several adjoining or neighboring owners to build upon a uniform plan, with a specified frontage or on designated lines.

Tulk vs. Moxhay (11 Beavan, 571; 2 Phillips, 774), determined that it was competent for persons to bind their lands perpetually by covenants of this description.

The Lord Chancellor in this case said, "That this court has jurisdiction to enforce a contract between the owner of land and his neighbor purchasing a part of it, that the latter shall either use or abstain from using the land purchased, in a particular way, is what I never knew disputed. The owner of certain houses in the square sells the land adjoining, with a covenant from the purchaser not to use it for any other purpose than as a Square Garden. It is now contended, not that the vendee could violate the contract, but that he might sell the piece of land, and that the purchaser from him may violate it. It is said that the covenant, being one which does not run with the land, this court cannot enforce it.

"In *Whitman vs. Gibson*, cited in *Cole vs. Sims*, the question was not whether the covenant runs with the land, but whether the party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased. If an equity is attached to the property by an owner, no one purchasing with notice of that

equity can stand in a different situation from the party from whom he purchased."

In *Rankin vs. Huskisson* (5 Simons, 13), the Commissioners of Woods were restrained from building on a part of the site of Carlton Palace, in violation of one of the terms of an agreement entered into by them with the plaintiffs for a building lease of an adjoining part of the site. In this case the injunction was of a mandatory character, forbidding the defendants from permitting such part of the buildings as had been already erected on the plot of ground from remaining thereon.

Every person who derives title from such original owners is bound by the agreement, provided he have notice of it; and it will be inferred that he has notice, if the instrument is referred to in deeds which make out his title.

In *Whitman vs. Gibson*, cited in *Cole vs. Sims* (23 En. L. & Eq. Rep. 588, *n.*), a deed was executed between the owner of the land and purchasers of different lots, by which they covenanted, each with the others, that they would build in a certain specified manner, and neither of them would allow his premises to be occupied for certain purposes. The title of both parties to the action was derived from the original covenanting parties, who had only covenanted with one another, and not for their assigns; but the defendant, having notice of the covenant, was held bound by it.

In *Cole vs. Sims* (*ut supra*) an injunction was granted in a similar case, against proceeding with or erecting any building in front of a particular line, being in continuation of the front of the plaintiff's house.

That the defendant had notice of an agreement of his grantor for the adoption of a line, was deduced from the fact that a conveyance under which he took referred to such agreement.

[D] **Penalty and liquidated damages.**

In cases in which the performance of covenants is secured by a penalty, the existence of such a remedy will not prevent the interference by injunction; otherwise in the case of a sum settled as liquidated damages.

Thus, in *Burne vs. Madden* (Lloyd & Gold, 493), where a lease contained a covenant against plowing or digging up any part of the demised premises, and in case the lessee did so, he should pay £5 for every cart of clay or sand which he should so dig up, and

also £5 in addition to the rent for every acre, so long as any part thereof should continue to be broken up or plowed up,—it was held, that the sum mentioned, being in the nature of a penalty, and not of liquidated damages, the court could restrain the lessee from violating the covenant.

A similar decision was made in *Cole vs. Sims*, *ut supra*. The peculiar terms of the clause as to damages was held not to be enough to displace the jurisdiction to interfere by injunction.

In *Barnes vs. McAllister* (18 Howard Pr. Rep. 534), one ground for denying an injunction was, that the parties had settled the amount of compensation.

I. 8. **Sale of land.**—An injunction will not be granted in case of a bill for a specific performance, against letting or selling the property where the validity of the contract is disputed. The *lis pendens* affords a sufficient protection to the plaintiff. (*Turner vs. Wright*, 4 Beavan, 40.)

In *Spiller vs. Spiller* (3 Swanston, 556), the Lord Chancellor said: He wished it to be understood as his opinion, that, in general, on a bill for specific performance of an agreement to sell, the plaintiff is not entitled to restrain the owner from dealing with his property. It would operate to control the rights of ownership, although the agreement was such as could not be performed. Under the circumstances, of a refusal to surrender copy-hold, after an assignment to trustees of his estate, and the vendor being insolvent, an injunction was allowed.

In *Echcliff vs. Baldwin* (16 Vesey, 267), and in *Curtis vs. The Marquis of Buckingham* (3 Ves. & Bea. 168), injunctions for this purpose were allowed, to prevent the possible necessity of making new parties. In neither case does it appear that the contract was contested. See also *The Shrewsbury and Chester vs. The Shrewsbury and Birmingham R. R. Co*, 1 Simons' N. S. 410.

II. *In relation to personal property.*

1. **Transfer of commercial paper.**

Where a bill or note has been obtained under circumstances which constitute a defence between the immediate parties, or when, after the making of such an instrument, the grounds of a valid defence arise, the maker or indorser may restrain the transfer of such instrument.

This right to call for the interference of the court is founded upon the rule that such defences will not prove available if the note passes, before maturity, into the hands of a *bona-fide* holder.

A leading case is *The Bishop of Winchester vs. Fournier* (2 Vesey, Sen. 445). A note was obtained, the body of which was in the handwriting of the defendant, but the signature in that of the plaintiff. It was found, upon proofs, to have been obtained by gross fraud and imposition. It was ordered to be brought into court and deposited with the Register; yet leave was given to bring an action on it within a fixed time—otherwise it was to be surrendered.

In *Baker vs. Loman* (cited 2 Vesey, Sen. 447), the bill was to have the consideration of a note set forth. It appeared to have been given in consideration of a bill of exchange, which was a false one. The Master of the Rolls enjoined proceedings, and ordered the note to be delivered to the Register, to abide the further order.

In *Smith vs. Haytwell* (Ambler, 66), the bill was to be relieved against a negotiable promissory note, given on a marriage brokerage agreement. The Lord Chancellor said: The plaintiff would otherwise be without remedy, if the note was disposed of for value, and without notice. If a note is taken when over-due, and there are suspicious circumstances tending to show that the maker is not liable upon it, an injunction will be allowed. Although the defence might be taken at law, the concurrent jurisdiction of a court of equity is not lost. (*Hodgson vs. Murray*, 2 Simons, 515.)

In *Minshaw vs. Jordan* (cited 2 Br. Ch. Rep. 17, *n.* by counsel), the bill was to have a note delivered up, and for an injunction to stay proceedings upon it at law. It had been obtained from the plaintiff in consideration of the defendant's inducing the plaintiff's father to make a will in his favor, when he was inclined to disinherit him. The injunction and bill were retained, with lib-

erty to the defendant to bring an action at law. A verdict was had in such action for the plaintiff in chancery, and the note was decreed to be delivered up.

— *vs. Adams* (Young's Exch. Rep. 117) is an example of a case where the holder of bills, knowing that they were given for the accommodation of the indorsers, could not recover against the acceptors. An injunction, granted at the commencement of the action, was made perpetual, and the bills were decreed to be delivered up.

In *Lloyd vs. Gordon* (2 Swanston, 180), the injunction was granted to restrain the indorsing, negotiating, or parting with three bills of exchange accepted by the defendant for a sum won at play. See, also, — *vs. Blackwood*, 3 Anstruther, 851.

In *Whittingham vs. Burgoyne* (3 Anstruther, 900), it was declared that the cases clearly establish the rule that, where a man sells his interest to procure for another an office of trust or service under the crown, it is a contract of turpitude, and cognizable by the jurisdiction of equity.

In *Foley and Dick vs. Carlon*, and nine others (1 Young's Rep. 373), the bill was by the acceptor and drawer of four bills against the payee and several successive indorsers, charged with a knowledge of the fraud of the payee, for an injunction and delivery; and the bill was sustained on demurrer.

If a bill or note is given by a member of a firm for his individual debt, and taken by one who has knowledge of that fact, the court will restrain its negotiation, though value has been given.

Hood vs. Aston (1 Russell Chy. Rep. 412), is a leading authority upon this point. It is sufficient to quote Lord Eldon's language, and only to refer to other cases:

"The mere circumstance that a partner gives a partnership bill for his separate debt, may or may not lay a ground for the issuing of an injunction against its negotiation; for the person who takes it may or may not have some reason for supposing that his debtor had a right or authority so to use the partnership name. But where it appears that an individual partner, indebted to the partnership, being unable to pay his separate bill holden by his bankers, substitutes for it by a negotiation with them, a partnership security, made and given without the consent or knowledge of his co-partners, and the bankers are aware that it

is so given—that is a case which comes within the principle upon which the court has always been in the habit of interfering by injunction.”

See also *Jervis vs. White* (7 Vesey, 413).

In *Clark vs. Gallagher* (20 Howard's Pr. Rep. 308), an injunction against negotiating a check was granted, where the check had been given to take up a previous check, loaned by the drawer to the person receiving it, who transferred it to a third person for an antecedent debt. The latter was held not to be a purchaser for value. See *Farrington vs. The Frankford Bank* (31 Barbour, 183).

2. Transfer of Stocks.—There are various cases in which a transfer of stocks, or a payment of dividends upon them, will be forbidden.

Thus, if an agent invests the funds of his principal and his own in stocks indiscriminately, and is guilty of neglect or fraud towards his principal, an injunction will be allowed against the transfer of any portion until a discrimination can be made.

This is the result of the decision in *Lord Chedworth vs. Edwards* (8 Vesey, 46), where an agent and steward had to his account at a banker's a very heavy amount of stock, the bulk of which appeared on the affidavits to have come from his employer's funds received by him. Lord Eldon noticed, that the mischief arising from granting an injunction as to the whole arose from the wrongful act of the defendant in mixing the stocks.

If the apparent title to stocks is in a deceased bankrupt, and the administratrix is about to sell them out, with a view to remit the proceeds to a foreign country, the court will, on application of the assignees, prohibit the transfer. (*Stead vs. Clay*, 4 Russell, 550.)

Where a company has fraudulently issued false certificates of stock, largely beyond the actual capital, and has become insolvent, an injunction will be allowed restraining such company and its officers from permitting a transfer of any stock, until a determination of the matter. See the statement of Justice Morris in *The People vs. The Parker Vein Company*, and others (10 Howard's Pr. Rep. 186.)

In *Underwood vs. The New York and New Haven R. R. Co.* (17 Howard, 537), an injunction was granted, restraining the defendants from paying a dividend declared by them, upon

any of the stock of the corporation, to any stockholders except such as could be ascertained to hold none of the spurious stock issued by the transfer agent; and from making any future dividend until the question of who were genuine stockholders was settled by a competent court.

The facts and circumstances of that case will be found detailed in *The Mechanics' Bank vs. The N. Y. and N. H. R. R. Co.* (3 Kernan, 599.)

In *Glasse vs. The Marshall and The India Company* (15 Simons, 71), an injunction was granted to restrain the defendant Marshall from receiving, and the company from paying, the amount of certain bonds obtained surreptitiously.

In *Fawcet vs. Laune* (1 Drewry & Smale, 192, 1860), the motion was to restrain the directors of the Union Bank of London from declaring any dividend to the stockholders except out of profits and surplus funds, and from paying a dividend which had been previously declared. The bill was by a single shareholder. The court considered that under the deed of settlement, the plaintiff had a standing in court, and the injunction was granted as to future dividends, but denied as to that already declared. The shareholders had acquired as to that a legal right, which could not be interfered with, unless they were parties to the action. *Carlisle vs. The Eastern Railway Company* (1 McNaughten and Gordon, 689), was referred to.

The course of proceedings where an injunction only is wanted against a bank or corporation to restrain the parting with stock or funds, is stated in Hoffman's Chancery Practice, vol. 1, p. 81. The cases of *Eldridge vs. Eldridge*, *Ross vs. Shearer*, and other authorities were cited. The practice prevailed in New York of making the institutions parties, praying the injunction and subpoena against them, and serving a notice that no other relief was asked than the restraint, and no answer required. The plaintiff would thus be exempted from costs, if the defendants needlessly defended.

3. Sailing of vessels.—The power of the court to restrain the sailing of a ship was touched upon in the case of the *East India Company vs. Sandys'*, and *Marasco vs. Boiton*.² These cases are of very little moment on this question, though cited by the text writers.

¹ 2 Ch. Cases, 165.

² 2 Vesey, Sen. 112.

In *Haly vs. Goodson* (2 Merivale, 77), it was ruled, that although the Court of Admiralty had jurisdiction to restrain the sailing of a vessel, on the application of a part owner, where his share was ascertained, yet if not ascertained, there was a concurrent jurisdiction in the Court of Chancery. The share and the proper security would be ascertained, and an injunction granted in the interim.

And in *Christie vs. Craig* (2 Merivale, 137), the power was impliedly admitted; the plaintiff coming so late that the court would not grant him assistance.

In *Goodheart vs. Lowe* (2 Jac. & Walker, 349), Lord Eldon refused to stop a vessel from sailing, on the application of the owner of goods who had a right of stoppage in transitu. He doubted if there was power, in any case, to stop goods in transitu.

In *Davis vs. Johnson* (4 Simons, 539), a part owner of a vessel, fitted out by the other owner and let to the East India Company, had her arrested in Admiralty, and compelled the other to give security. The ship sailed, and returned home. It was held that the part owner taking the security, was not entitled to any part of the profits, but was bound to pay his share of the repairs and outfit previous and up to the time of the arrest.

The text writers cite the cases from Merivale's Reports, as declaring the law upon this subject. (Abbott on Shipping, 104; Collyer on Partnership, § 1210; Willard's Eq. Jurisdiction, p. 362.)

It is stated that the dissenting owner who arrests the vessel in Admiralty, is not responsible for repairs or outfit. I presume this means for expenditures subsequent to the arrest. The above case of *Davis vs. Johnson ut supra*, holds him responsible for previous disbursements. (See Abbott on Shipping, 100; Flanders on Shipping, §§ 367, 368.)

In *Buddington vs. Stewart* (14 Conn. 404), a share of one part owner of a vessel was attached by his creditor. It was ruled that the others could send her to sea, securing the creditor's interest. See, also, *Rodich vs. Hinkley*, (8 Greenleaf, 274.)

In *Lidgett vs. Williams* (4 Hare, 456), a motion was made to restrain the defendant from proceeding with a ship to any other place than Liverpool, or such other place as the plaintiff should

direct, and from selling or disposing of her cargo of guano, or any part thereof, except to the plaintiffs. The court laid down the following rules in deciding the motion.

“The obligations of a captain are of a high order. He is not *prima facie* allowed to make any profit by the use of the ship. The owners may claim any such benefit. By attempting it, he places himself in a position adverse to his duty, which is, to exert all his powers to make the ship profitable to her owners. (Gardner *vs.* McCutcheon, 4 Beavan, 542.) If there is a charter, that duty of the master is transferred to the charterer. And he is bound to use, on behalf of the latter, the same diligence and fidelity as towards the owner. Generally speaking, therefore, he cannot trade with the ship on his own account, even when part owner.”

But as in that case the agents of the charterer failed to procure the cargo intended, and the master by great diligence did obtain it, it was held that the cargo was on the owner's account, not the charterer's. An injunction founded on this conclusion was granted, as to so much of the guano as had been obtained by the efforts of the plaintiff's agent.

In *Furniss vs. Brown* (8 Howard Pr. Rep. 59), the court said, that as joint owner of the vessel in question, Furniss was entitled to an injunction. In cases of disputes between joint owners, we adopt and apply in this court the rule of Admiralty; and that is, to give the majority in interest the possession and control; and where there is not a majority, order the vessel to be sold. The injunction granted restrained the defendants from removing a steamship beyond the jurisdiction.

In *Lewis vs. Dodge* (17 Howard's Pr. Rep. 229), a party claimed a lien on a fund for salvage services; and others, who had performed similar services, claimed also a portion of the fund. The action sought an equitable apportionment of it among the parties, and an injunction was sustained to restrain the interference with it by others claiming a lien and possession, they being irresponsible. The proceeds were ordered to be paid into the hands of a receiver during the suit.

4. Contested probate.—By a statute of this State the surrogate is authorized, in case of a contest relative to the proof of a will, or by reason of absence of an executor named in a will, delay in

granting letters is necessarily produced, to issue special letters of administration to one or more persons, authorizing the collection and preservation of the goods of the deceased. (Laws of 1837, p. 578, § 23.) Every such collector shall have authority to collect the goods, chattels, and debts of the deceased, and for that purpose to maintain suits as an administrator.

Administration *pendente lite* was granted also by the English Ecclesiastical Courts. The officer was merely an officer of the court, and held the property only till the suit was determined. As soon as the litigation ended, he was bound to pay over the funds and deliver the property to those found entitled. A monition to pay and deliver would be granted. (In the matter of the goods of Susanna Graves, 1 Haggard's Rep. 313.)

By an act of 38 Geo. III., c. 87, where proceedings were pending in chancery concerning a will, and the executor was absent, an administrator *pendente lite* might be appointed by the Ecclesiastical Courts. This, however, did not extend to any other cases of absence. (In the goods of Thomas Davies, 2 Haggard, 79.)

If the executor was absent from the country, there seemed to be no remedy. Mr. Dayton considers that there is no power to appoint an administrator *ad colligendum*, except as prescribed by the statute. This is before probate granted. (Office of Surrogates, p. 64.) As to the powers of an administrator *pendente lite*, see *Adair vs. Shaw*, 1 Sch. & Lefroy, 254.

The Court of Chancery exercised the jurisdiction of preserving the property by injunction and a receiver, while a contest as to probate was going on in the Ecclesiastical Tribunals.

In *Atkinson vs. Henshaw* (2 Vesey & Bea. 85), the plaintiffs were named executors of a deceased partner by his will, and sought to obtain letters, which was opposed by the other named executor and the surviving partners. The contest was proceeding in a Consistory Court. A bill was filed for an injunction and receiver. Lord Eldon stated the jurisdiction to have been plain, before *Walker vs. Wollaston* (2 P. Wms. 576). That determined that an administrator *pendente lite* had power to sue for debts; and the establishment of that rule was not sufficient to take away such ancient jurisdiction.

In *Ball vs. Oliver* (2 Ves. & Bea. 96), the Vice-Chancellor acted upon this doctrine. The defendants had obtained adminis-

tration, which the plaintiffs sought to set aside by a suit in the Ecclesiastical Court. The bill charged that the defendants had got possession of the personal estate, were insolvent, and prayed an account, and injunction pending the suit. The last was granted, although insolvency was denied.

In *Connor vs. Connor* (15 Simons, 598), it was held that the mere pendency of a suit to recall letters was not sufficient ground for the interference of the court, where no insolvency or misuse of the assets was shown.

In *Mootrie vs. Hunt* (4 Bradford's Rep. 173), Mr. Surrogate Bradford granted letters to collect, where he had issued letters of probate, but an appeal had been lodged, and was pending.

5. Specific chattels.—If the right to a specific chattel is clear, a court of equity will, under certain circumstances, interpose to protect its enjoyment, or prevent its being injured.

Thus, in *The Duke of Somerset vs. Cookson* (3 Pr. Wms. 390), an old altar piece of silver, of classic character, valuable for its antiquity and rarity, came into the defendant's possession, with notice of the plaintiff's title. Although the plaintiff could have recovered in trover, Lord Thurlow held him to be entitled to relief in equity.

In *Fells vs. Read* (3 Vesey, 70), a society had for some time had possession of a silver tobacco box, inclosed in two silver cases, with several engravings of public transactions and heads of eminent persons. They were kept by the overseer for the time being, and as such overseer the defendant obtained them. He refused to surrender them unless his accounts were passed. A bill for their surrender was sustained. They had been delivered to a master, under an order. The party held it coupled with a trust to deliver it at a certain time. There was a clear jurisdiction to compel the execution of such trust.

And in *Wood vs. Banceliff* (3 Hare, 308), the bill was for the delivery of specific chattels deposited by the plaintiff with his agent, which the latter fraudulently contracted to assign to another, who advertised them for sale, for an injunction to restrain the sale, and any disposition of the articles, the goods being still in the possession of the agent. A demurrer was overruled. The chattels were ordinary furniture and effects. It was insisted that the interference of the court was only granted as to articles of a

peculiar character, as articles of curiosity, antiquity, or hereditary estimation, to which the *pretium affectionis* applied. But the Vice-Chancellor held the plaintiff to be clearly entitled to be protected against the wrongful act of her agent, and the concerted fraud.

In *Lady Arundel vs. Phipps* (10 Vesey, 148), the wife having separate estate, purchased out of it from her husband, certain books, paintings, and statues, in the name of trustees, for her own use. In an action between her and her husband's creditors, these articles were seized by the sheriff. Lord Eldon restrained the sale, pending the further litigation of the title.

6. In aid of action.—In the case of *Erpstein vs. Berg* and others (13 Howard's Pr. Rep. 91), the action was to recover personal property. The plaintiff had deposited furniture with the defendant Berg to sell, and share the profits. He sold to another defendant, with a fraudulent intent to cheat the plaintiff. Such defendant knew of the want of title. Mr. Justice Davies sustained an injunction preventing the defendants from interfering with, transferring, or incumbering the property. *Furniss vs. Brown* (8 Howard, 59), was cited and relied upon.

III.—*Relating to productions of mind and art.*

This subject is discussed under the following heads :

1. Patents.
2. Copyrights.
3. Unpublished manuscripts.
4. Private letters.
5. Public lectures.
 - [A] Editor and publisher.
 - [B] Libellous publications.
 - [C] Immorality of works.
6. Secrets of trade.
7. Trade-marks.
8. Miscellaneous—
 - [A] Editor and publisher.
 - [B] Libellous publications.
 - [C] Immorality of works.

1. Patents.—Mr. Justice Willard, in his work upon Equity Jurisprudence (p. 283), has stated the statutes and leading cases which bear upon this subject. The Constitution empowers Congress to secure to authors and inventors the exclusive right to their respective writings and discoveries. The judicial power extends to all cases in law or equity, arising under the Constitution and laws of the United States. Congress has exercised the power by passing various acts for the protection of authors and inventors. By the act of Congress of 15th February, 1819, original jurisdiction, at law and in equity, is given to the Circuit Courts of the United States, of all actions, suits, controversies, and cases arising under any law of the United States, granting or confirming to authors or inventors the exclusive right to their respective writings, inventions, or discoveries; with power to grant injunctions, according to the course and principles of courts of equity, to prevent the violation of any rights of authors or inventors. The act of July 4, 1836, makes all such actions and controversies cognizable in the Circuit Courts, and District Courts having the powers and jurisdiction of Circuit Courts.

In *Dudley vs. Mayhew* (3 Comstock's Rep. 9), a bill had been filed by an assignee of a patent for a particular district, to restrain the defendant from manufacturing and selling the stove which was the subject of the patent. A Vice-Chancellor had granted an injunction, which the Chancellor had sustained on appeal.

The Court of Appeals held that, at common law, and exclusive of the act of Congress, authors and inventors acquire no exclusive right to the benefit of their writings and discoveries. That the courts of this State had no jurisdiction to restrain the infringement of a patent right; nor could a consent confer it. The Federal courts had exclusive jurisdiction. Where a statute confers a right, and prescribes adequate means for protecting it, the proprietor of the right is confined to his statutory remedy.

In *Gibson vs. Woolworth* (8 Paige, 132), Chancellor Walworth decided, that the courts of the United States had exclusive jurisdiction, under the law of July 4, 1836, as to interfering patents, in cases where the court, under that law, is authorized to declare a patent inoperative and void, either wholly or in part, or as to any particular portion or district of the United States.

But the State courts appear to have the power to consider the validity of patents, when the question arises collaterally.

In *Burrall vs. Jewett* (2 Paige's Rep. 134), the Chancellor did consider the validity of a patent, concluded it was void, and ordered an agreement and note given upon the faith of its validity to be canceled. See, however, his subsequent decision in *Gibson vs. Woolworth*, *ut supra*, and *Dudley vs. Mayhew*.

2. Copyrights.

It would be foreign to the scope of this work to state minutely the decisions upon the law of copyrights or patents, as to when an injunction will be granted. One leading authority contains some rules and principles of general importance and utility.

In *Jefferys vs. Boosey* (30 En. L. & Eq. Rep. 1, House of Lords), it was held that the object of the statute of Anne, cap. 19, was to encourage literature among British subjects; and such description included such foreigners as, by residence in England, owed the crown a temporary allegiance. Any such foreigner, first publishing his work there, was an author within the meaning of the statute, no matter where his work was composed, or whether he came to the country solely with a view to its publication. Copyright commences by publication; if, at that time, the foreign author is not in the country, he is not a person protected by the statute. An Englishman resident abroad will have copyright in a work of his own first published in England. But when a foreigner composed a work in his own country, and assigned the right in it to another foreigner, who brought the composition to England, and assigned it to an Englishman, who first published it, it was held that no copyright existed.

The judges differed upon the great question of copyright at common law. Lord St. Leonards and Lord Brougham held that it did not exist; it was purely the creature of the statute.

3. Unpublished manuscripts.

It may be considered as settled that, by the common law, an author had a right of property in his unpublished manuscripts, whatever was their nature, whether intended for publication or not, and whether of pecuniary value or not. (*Woolsey vs. Judd*, 4 Duer, 379, and the leading cases there cited; *Bartlett vs. Crittenden*, 5 McLean, 32; *Curtis on Copyright*, page 84.)

This right is not affected by the statutes as to copyright. The latter operate in the case of a publication merely. The publication by an author is a dedication to the public use. The right of property in a manuscript can be transferred or abandoned, like

the right in any other property. Publication is such an abandonment. The statutes operate to continue the right, which before was unlimited, for a definite period after publication, upon compliance with certain provisions.

In *Prince Albert vs. Strand* (1 Hall & Twell's Chy. Rep. 1, 1849), it was held that the maker and owner of etchings, which had never been exhibited or published, and of which no impressions had been made, except for private use, but impressions of which had come into the hands of others by surreptitious means, was entitled to an injunction, not only to restrain the exhibition of such impressions and publishing copies, but also from publishing a catalogue compiled by themselves, in which an enumeration and description of the etchings was contained.

The act of Congress of February 3, 1851, provides, in the ninth section, that "any person who shall print or publish any manuscript whatever without the consent of the author first obtained in writing, shall be liable to an action for damages. And the several courts of the United States, empowered to grant injunctions to prevent the violation of the rights of authors, are hereby empowered to grant injunctions in like manner, according to the principles of equity, to restrain the publication of any manuscript as aforesaid.

It was doubted, in *Woolsey vs. Judd* (4 Duer, 379), whether this ninth section extended to the publication of private letters without the consent of the owner. That question, however, was for the determination of the courts of the United States. But if the State courts had jurisdiction of such a publication before the Federal Constitution was adopted, they possess it still. See this case fully stated, *post*, title "Publication of Letters."

In *Bartlett vs. Crittenden* (5 McLean's Rep. 32), it was held that private letters were within the ninth section.

In this case it was also held that the common-law right of property in a manuscript was also protected by the ninth section of the act of Congress above cited; and if the whole, or any important part of a work be taken and printed, Chancery will enjoin its publication, on the application of the author, or his legal representatives.

On this subject, the rule is the same as to unpublished as to published matter. The question of piracy does not depend upon the quantity, but upon the value of the matter taken.

In *Bohun vs. Bogue* (10 Jurist, 420), a very small portion of the plaintiff's work had been used. The defendant stated that what he had rejected was worthless. The marrow of the plaintiff's production had been used, and an injunction was granted.

In *Campbell vs. Scott* (11 Simons, 31), whole passages were taken from the plaintiff's book. The defendant insisted that it was trivial in quantity, was used in illustration, and could not injure the plaintiff's sale. The court thought that the passages formed part of the substratum of the defendant's work; there was clearly an injury, and the *damnum* might be presumed. An injunction was granted.

The rule in the instances of Encyclopedias, Dictionaries, and similar works, was laid down by Lord Eldon, in *Mawman vs. Tegg* (2 Russell, 385). When the court sees that the piratical part is such that, if removed, it would destroy the whole, an injunction might be granted against the whole; but the court would rarely grant an injunction against the whole, without ascertaining, by inspection or otherwise, the quantity of matter pirated. The best evidence of piratical copying was, that the blunders of the original book were transcribed into the one accused. If a number of such are found, the presumption arose of the same being the case as to passages in which there were no blunders.

In *Bramwell vs. Halcomb* (3 Mylne & Craig, 737), the court repeated the doctrine, that it was the value and quality of what was taken, that constituted piracy.

See further *Saunders vs. Smith* (3 Mylne & Craig, 711); *Touson vs. Walker* (3 Swanston, 672); *Lewis vs. Fullarton* (2 Beavan, 6); *Sweet vs. Benning*, (30 En. L. & Eq. Rep. 461); *Drewry on Injunctions*, 205, 206.

In the *Att'y-Gen. vs. Strange* (13 Jurist, 109), a party had obtained a copy of the etchings of another without his consent, and was about publishing a catalogue of them. He was restrained. Lord Cottenham said: "It was to make known to the public, more or less, the unpublished works and compositions of the author, which he is entitled to keep for his private use and pleasure."

Foreign author.—The right of a foreign author to his unpublished manuscript is as clear, and will be equally protected, as that of a native citizen.

This was conceded in *Jeffreys vs. Boosey* (30 En. L. & Eq. Rep. 1). It was strongly asserted by Justice Earl, and scarcely less so by Justice Coleridge.

In *Redfield vs. Middleton* (Special Term, Superior Court, October, 1860), Justice Hoffman adverted to the fact that the law of Congress as to copyright was the same as the English law. None but a citizen could avail himself of it. (Curtis on Copyright, p. 141.) "But the right of a foreign author to his unpublished manuscript was just as clear, and equally the subject of judicial protection, as the right of a citizen. As to the right of the latter, it was needless to refer to any other authority than that of *Woolsey vs. Judd* (4 Duer, 385); as to the former, I recognize the propositions of Justice Earl, in *Jefferys vs. Boosey*, as clear law. The right will be enforced for an alien as well as for a native author, it being a personal right, resting on principles common to all nations who read.

"The case of *Taylor vs. Carpenter* was before Mr. Justice Story (3 Story's Rep. 450), and before Mr. Justice Woodbury (2 Woodbury & Minot, 1). In each instance, as well as in our own courts (2 Sandf. Chy. Rep. 603), protection was given to the trademark of a foreigner. The protection of his unpublished manuscript should be at least as decided."

4. Publication of letters.—This subject was so thoroughly examined by Mr. Justice Duer, delivering the opinion of the Superior Court of New York, in *Woolsey vs. Judd* (4 Duer's Rep. 379), as to render a reference to any prior case unnecessary.

The object of an injunction was to restrain the defendants from publishing in a newspaper, of which they were proprietors or publishers, a letter which the plaintiff had written and forwarded to one Mr. Croswell at St. Louis. The complaint alleged that the letter was wholly private in its character, and that the defendants had, by some unlawful means, possessed themselves of a copy of it.

The defendants, by answer, denied that the letter was of a private nature, or that they had unlawfully obtained it. A copy had been sent to them through the post office, with a note from a person, that they might use it as they should think proper. The name of such person was not stated. They insisted that the letter was not a literary production, nor of any value to the plaintiff

as such; and hence, that the court had no authority to restrain its publication.

Upon the affidavits it appeared, that the defendants claimed the right to publish the letter, for the purpose of fixing upon the plaintiff and his correspondent Crowell, the imputation of being the authors or instigators of certain abusive publications, relative to a religious society called The American Bible Union, its agents and friends.

The points decided by the Superior Court were:

1st. That State courts retain their jurisdiction in all cases of which they had originally cognizance; and there are only two cases in which the jurisdiction of the courts of the United States may be regarded as exclusive. First, when it is made exclusive by express terms, or by necessary construction of the Constitution; second, when an act of Congress confers a jurisdiction that before its passage could not have been exercised at all.

2d. That the question was, whether the publication of private letters, without the consent of the writer, even when the letters have been sent to, and are in possession of, his correspondent, is an invasion of an exclusive right of property which remains in the writer.

3d. An undoubted exclusive right to an unpublished manuscript existed at the common law, in its author. This right was not affected by the statute as to copyright. The publication to the world, was the subject of the statute, and that continued the before general unlimited right of property for a definite period.

4th. The right was wholly independent, either of an intention to publish the manuscript, or of any pecuniary value, or intrinsic value as a composition. "That exclusive right to a manuscript yet unpublished, rests upon the same foundation as that which sustains every other description or species of property. Its sole foundation is "the right which every man has to the exclusive possession and control of the products of his own labor." (Curtis on Copyright, p. 84.)

5th. There was no just ground for distinction between the case of an unpublished manuscript (of matter possibly intended for publication), and private letters.

6th. The transmission of letters does not vest the whole prop-

erty in the receiver, or operate as an absolute gift. They cannot be published without the consent of the writer, either by the party to whom they are addressed, or by others. The exceptions stated by Justice Story, as to the right of the receiver, are recognized. (2 Story's Rep., pp. 110, 111.) These are hereafter stated.

7th. The cases of *Wetmore vs. Scoville* (3 Edw. Ch. Rep. 515), and of *Hoyt vs. Mackenzie* (3 Barb. Ch. Rep. 314), were considered not to be law.

There is one point but slightly touched upon in this decision, which is of moment. It relates to the character and extent of the right of the receiver of letters.

The learned judge speaks in two instances, of the exclusive right of property being in the writer. He shows that the right of publication, without the consent of the writer, is not in the receiver, with the excepted cases of where it is necessary to maintain his action or defence in courts of justice: or where he is aspersed by the writer in a public manner; when he may publish such parts of the letters as are necessary to vindicate himself.

But I presume, that the receiver has also such a right of property as will enable him to restrain a piratical publication by another. The possession of the mere paper is in him. The communication has been made to him. Whatever of the mind—the intellectual product—is found in it, has been placed in his power; has been published to him. A joint property is thus made out, so far, at least, as to justify the action of the receiver, to protect the property from others.

In *Eyre vs. Higbee* (35 Barbour, 502), it was held that private letters were not assets in the hands of the receiver's administrator. They could not be sold by him as assets for payment of debts.

The letters in question were written by General Washington to Colonel Lear, his military secretary. The receiver had a property in them which, on his death, went to his administrator. But there was a joint property in them with the writer, so as to prevent their becoming assets.

For forty years the letters had been in the possession of the receiver's widow. This was enough to vest the property in her—to warrant the presumption of a transfer. Under her, the

defendant had obtained possession. The administrator of the receiver, appointed forty-one years after his death, assigned and sold the letters to a party under whom the plaintiff claimed.

In *Palin vs. Gathercole* (1 Coll. Cases, 565), it was held that a receiver of letters would not be permitted to publish them, for the purpose of representing to the public as true, what he had, in legal proceedings upon the very subject, admitted to be false.

Letters within the act of Congress.—A doubt was expressed in *Woolsey vs. Judd* whether the published letters were within the meaning of the 9th section of the act of Congress, notwithstanding its comprehensive language.

But in *Bartlett vs. Crittenden* (5 McLean's Rep. 34), it was decided that they were included. *Tolsan vs. Marsh* (2 Story's Rep. 100) was cited. The case is instructive for its general statement, and discussion of the principles on which an author's rights depend.

5. Public Lectures.—It has been doubted whether a public lecturer could enjoin the publication of his lectures, or notes of the same, without a contract between him and his hearers forbidding it. But if pupils attend lectures, there is an implied contract that they shall not publish them, or notes of them, without permission. They may make full notes for their own use. In the case cited a person who did not show how he became possessed of the lectures, was presumed to have obtained them from a pupil, and was enjoined. (*Abernethy vs. Hutchinson*, 3 Law Journal, 209, stated in *Drewry on Injunctions*, p. 212. Reported in full in *Maugham on Literary Property*, 147.)

By a statute of 5 and 6 William IV. cap. 65, the right of publication is limited to the author, or the person to whom he has sold a copy, in order to deliver the same in any school, seminary, institution, or other place. No person allowed, for fee or reward, to attend a lecture, shall be considered licensed to print, copy, or publish the same.

In the case of *Mott vs. Bell*, before the author, as Assistant Vice-Chancellor, 1839, the defendant attended the lectures of the plaintiff upon surgery, for which he paid a certain fee or compensation. He commenced the publication of the substance, and to some extent of the language of the lectures, in a public news-

paper. An injunction was allowed. The positions taken to support this decision were as follows:

By the opinion of probably all judges before and since *Miller and Taylor*, an author has, at common law, a property in his manuscript, and might obtain redress against any one who deprived him of it, or, by improperly obtaining a copy, sought to realize a profit by its publication.

This right, according to present settled law, does not extend beyond publication, except as the right is secured under copyright statutes.

But it is publication, in the sense of surrender or dedication to the public use, which amounts to such a publication as terminates the original right. And the intention with which an act claimed to amount to such a surrender is done, is a material inquiry.

A lecturer regularly reading his productions in manuscript to persons paying, directly or indirectly, for the privilege of hearing them, cannot be treated as designing a general dedication to the public use. It is a limited, conditional, and confidential communication.

It was also held, that the fact of the lecturer using notes or heads only in manuscript, so that a large part of the lecture was oral, did not make a difference.

Mr. Curtis (on Copyright, p. 101), has taken views very similar to those expressed in this case, which was never reported.

In *Wharton vs. Peters* (8 Peters U. S. R. 668), the court declared unanimously, that no reporter had or could have a copyright in the opinions delivered by the judges, and the judges could not confer such a right upon a reporter.

The opinion of Mr. Justice Thompson on this point of publication is very apposite and clear. I presume that the open reading of opinions is an unconditional publication to the world.

6. Secrets of trade.—Whatever doubt may have been thrown upon the question in earlier cases, it is now settled in England, that a party may be restrained from using a secret of trade imparted to him by an employer; such as the mode of compounding a medicine.

In *Morrison vs. Moat* (6 Eng. L. & Eq. Rep. 14; *ibid.* 9, 182), Morrison was the inventor of a medicine not patented. Upon entering into partnership with Moat, he bound himself not to

communicate the secret of the mode of compounding to any one but some future partner; and Moat bound himself not to communicate it to any one. He did inform his son of it, who used it, and sold the medicine under the same name as Morrison did. He was enjoined from selling under the name of Morrison's medicine "any medicine compounded by him, and also from compounding any according to the secret, and from making use of such secret in any way."

Sir George Turner, Vice-Chancellor, went over the authorities very fully. On appeal (9 En. L. & Eq. Rep. 182), the Lord Chancellor (Lord Cranworth) said, "the principles that were argued in this case, are principles really not to be called in controversy. There is no doubt whatever that where a party who has a secret in a trade, employs persons under contract, express or implied, or under duty, express or implied, those persons cannot gain the knowledge of that secret, and then set it up against their employer."

In *Youatt vs. Winyard* (1 Jac. & Wal. 395), a person, possessed of a secret medicine, employed another to assist him in his business generally, under an agreement that he was not to be taught the mode of composing such medicines. The assistant obtained a knowledge of the composition by breach of trust, and was restrained by injunction from using or communicating that composition.

But, in *Canham vs. Jones* (2 Vesey & Bea. 218), where the bill alleged that the defendant made and sold a medicine identical in composition and quality with the secret medicine of the plaintiff, a demurrer for want of equity was allowed. There was no right of property, properly so called, in a secret medical recipe.

See, also, *Newberry vs. James* (2 Merivale, 446).

In *Williams vs. Williams* (3 Merivale, 157), the plaintiff agreed to take the defendant into partnership for the manufacture of medicine made under a secret recipe, instructed him in the secret, and put him in possession of the medicines. The court restrained the defendant from selling the medicine, or interfering in the management of the business without the consent of the other. As to the *secret*, if the defendant swore that it was not communicated by the plaintiff, he would not be restrained from divulging it;

and if he had already divulged it, an injunction would be of no use.

In *Evitt vs. Price* (1 Simons, 483), the plaintiffs were attorneys, and had for several years employed the defendant as an accountant, and intrusted him with the affairs and secrets of the firm, and had free access to their books and papers. He had made contracts from such books and papers, and, threatening to publish, was restrained from communicating the particulars or contents to any person whatever, or any information possessed by him relating to the copartnership, arts, affairs, or the secrets thereof, or the clients thereof, acquired by reason of his employment.

Carter vs. Palmer (1 Drury & Warren, 722), is to the same point.

7. Trade-marks.

I include under the name trade-marks all devices, symbols, designs, names, and emblems, by which a particular commodity is intended to be designated and distinguished, as made or owned by a particular person. The subject has occupied a great deal of judicial investigation. Mr. Upton, of the New York bar, has lately published a valuable treatise upon it.¹

Designs, or trade-marks, may, by an act of Congress of Aug. 29, 1842, become the subjects of letters-patent. Mr. Curtis (On Patents, §§ 105, 106) observes: "These are new and original *designs* for a manufacture of metal and other materials; for the printing of woolen, silk, cotton, or other fabrics; for any impression or ornament to be placed on any article of manufacture in marble or other material; for any new and useful pattern, print, or picture, to be in any way attached to or fixed on any article of manufacture; for any new or original shape or configuration of any article of manufacture—all such designs not being previously known or used by others. Patents for these subjects are to be issued on the like application and proceedings as those prescribed in other cases of patents, for the term of seven years."

"The patents thus granted relate to the forms impressed upon the material constituting particular articles of manufacture, and to the marks adopted by tradesmen, whether patterns, prints, or pictures, to distinguish their own manufactures. They thus occu-

¹ Upton's Law of Trade-marks, 1860.

py a kind of middle ground between copyrights and patents, as patents for useful inventions have heretofore been classed. Indeed, the exclusive right to impress upon matter a particular form, or to affix a particular device to a bale of merchandise, is closely analogous to the exclusive right to print a particular book or engraving, if it is not precisely the same right. The same general principles, at least, must be resorted to, to determine the identity between two forms of matter, as forms, or between two devices, as devices, which determine the identity of new books or engravings."

I do not know that the general principles and rules upon this subject, can be found better condensed and expressed, than by Lord Chancellor Cranworth, in *Farina vs. Silverlock* (39 En. L. & Eq. Rep. 514). He said:

"The plaintiff's equity is founded on the jurisdiction of this court to give relief, in the shape of preventive justice, in order to make more effectual a legal right; the legal right here being a right to have a particular trade-mark to designate a commodity. This right cannot properly be described as a copyright; it is in fact a right which can be said to exist only and can be tested only by its violation. It is the right which any person, designating his wares or commodities by a particular trade-mark, as it is called, has to prevent others from selling wares which are not his, marked with that trade-mark in order to mislead the public, and so incidentally to injure the person who is owner of the trade-mark. Judges may occasionally have erred in the application of the law to particular facts; but I apprehend that the law is perfectly clear that any one who has adopted a particular mode of designating his particular manufacture, has a right to say, not that other persons shall not sell exactly the same article, better or worse, or an article looking exactly like it, but that they shall not sell it in such a way as to steal (so to call it) his trade-mark, and make purchasers believe that it is the manufacture to which that trade-mark was originally applied."

Following out the inquiry upon this series of propositions, and collating the authorities by the principles thus stated, it is to be observed—

1st. The court interferes to make more effectual a legal right.

That right is the power to designate a man's own wares or commodities by a particular mark, which is termed a trade-mark.

The Lord Chancellor characterizes that which a court is to protect as a legal right. Many judges say, that they cannot understand how there can be any right of property, or, that there is no right of property, in a mark or device. Yet it is obvious, that if the benefit flowing from the use of the mark is to be protected in equity, and may be the subject of an action at law, it is a vested interest, and it is immaterial how it is designated.

The source of this legal right—the mode of acquiring it—is, as I apprehend, invention, or appropriation; and in either case, a continued user.

“I have no doubt,” says Lord Langdale,¹ “that another has not a right to use that name or mark for the purposes of deception, and in order to attract to himself that course of trade or that custom which, without that improper act, would have flowed to the person who first used, or was alone in the habit of using, the particular name or mark.”

Millington vs. Fox (3 Mylne & Craig, 338), must rest—indeed, can only be supported—upon the principle of a vested right acquired by user. The defendants were free from all fraud—were, in fact, ignorant of the employment of the names and devices by the plaintiffs.

Hine vs. Lart (10 Jurist, 106) rests upon evidence deemed sufficient by the Vice-Chancellor, of long exclusive user. Mr. Drewry comments upon it, as open to the objection of determining a doubtful legal right without an action at law.² But it was for the court to say whether it was doubtful. The power to determine for itself cannot be questioned.

Perry vs. Truefitt (6 Beavan, 66) is a striking example of this point. The question was, whether the plaintiff had a right to the appellation Medicated Mexican Balm, no fraud being imputable to the defendant for using it, joined with his own name. And this question the Vice-Chancellor allowed³ the plaintiff to try at law, although he would not grant an injunction at once.

In *Fettridge vs. Merchant*,³ the judge, having brought the

¹ *Perry vs. Truefitt*, 6 Beavan, 66.

² Supplement to Injunctions, p. 57.

³ 4 Abbotts' Reports.

case down to the inquiry as to original appropriation and user, and finding the evidence quite doubtful on that point, left it to the plaintiff to establish his legal title on that basis.

And in the *Amoskeag Company vs. Sperry* (2 Sandf. Sup. Ct. Rep. 599), it was reserved for trial before a jury in the action, whether the plaintiff had an exclusive right to the use of the letters A. C. A on his tickings.

I apprehend, then, that when the right is to be tried at law, the first question is, whether the plaintiff had by invention, or appropriation and user, acquired a right to the particular mark. And the next question is that which Justice Bailey put to the jury in *Sykes vs. Sykes* (3 Barnwell & Cresswell, 541), as to the intent of the defendant in employing the mark.

Mr. Justice Robertson in the case of *Corwin vs. Daly*¹ appears to some extent to question appropriation or first invention being a test, remarking that if an appellation had been used by another, and then been long abandoned, a party might adopt it himself, and be protected. But it is submitted, that the relinquishment by the first inventor or appropriator, and subsequent adoption by another party, is equivalent to a primary adoption—really rests upon the same principle.

2d. Lord Cranworth next defines the right to consist in the privilege of designating the party's wares or commodity by a mark termed a trade-mark, which entitles him to prevent others from selling such wares not belonging to the party under such designation.

The question is, what species or character of appellation or device may become the subject of ownership, so as to give this right of prevention?

It is well settled that there can be no such exclusive right to appellations which merely indicate the appropriate name or the relative quality of the article, and which have no relation to the origin or ownership of it. But there is a right to the use of such as were appropriated to designate the true origin or ownership of the fabric.

This proposition is stated in nearly the language of Justice

¹ Superior Court, General Term; cited at length in Upton's Treatise, p. 187.

Duer, in *The Amoskeag Manufacturing Co. vs. Spear* (2 Sandf. Sup. Ct. Rep. 599, 606). And Justice Strong, in *Stokes vs. Landgraff* (17 Barbour, 698), expands it thus: "In respect to words, marks, or devices, which do not denote the goods or property, or particular place of business of a person, but only the nature, kind, or quality of the articles in which he deals, a different rule prevails. No property in such words, marks, or devices can be acquired. There is obviously no good reason why one person should have any better right to use them than another."

The principle thus stated was applied in the *Amoskeag Company case*, thus: The complaint averred that the letters A. C. A on their tickings signified—the first two, Amoskeag Company, and A, best quality. On the other side, it was insisted, that they indicated only that the ticking to which such label was attached was of the best quality of the manufactory. And this version the court considered to be made out. The court would not allow an injunction to restrain the use of these letters.

And in *Stokes vs. Landgraff* (17 Barbour, 608), such words as "Lake," "Cylinder," "New York," were found, upon the affidavits, to be applied by manufacturers of glass, and understood by dealers as applicable to various qualities. It was not the practice to distinguish the varieties by expressive words or figures.

And so in *Corwin vs. Daly* (N. Y. Superior Court, June, 1860, stated fully in *Upton on Trade-marks*, p. 187), the epithet "Club-House Gin" indicated merely the superior quality of the article, and was disconnected from origin or ownership.

The simplest case of an appellation or designation which will be protected is, when the party uses his own proper name, in full, or abbreviated, or by initials so used, as that there can be no misunderstanding who is intended.

Millington vs. Fox (3 Mylne & Craig, 313) is an example of this class. The name "Crowley," and afterwards "Crowley, Nuttington," were the names of the party, or the firm, and J. H. the name of the principal workman. These names had come to designate the manufactured steel of the plaintiffs.

Morison vs. Salmon (2 Man. & Gr. 385) is of the same nature. The medicine had acquired a reputation under the name of "Morison's Universal Medicine."

So in *Croft vs. Day* (7 Beavan, 84), the name placed upon a label on the bottles of blacking was "Day & Martin," "97 High Holborn." The defendant Day was a descendant of the original Day, and associated a person of the name of Martin with him.

The *Brooklyn White Lead Company vs. Masury* (25 Barbour's Rep. 416) is another example of this class. The plaintiffs had used that name or stamp upon the kegs of white lead manufactured by them, for twenty years. The defendant labeled his kegs "Brooklyn White Lead," and was not interfered with. He then used "Brooklyn White Lead *and Zinc* Company." He had no such company. He was restrained from using the words "Company or Co."

Whether there was in this case a mere association, or a corporation, does not appear. It is very analogous, however, in either view, to the use of individual names, or the mark.

Knott vs. Morgan (2 Keen, 213) is also of this class. The plaintiffs' sign on their omnibuses was "Conveyance Company," or "London Conveyance Company." The device of a star and garter, and the color of the dress of the drivers, was also imitated.

Another class of cases is, where the name of the manufacturer is distinctly joined with an appellation, directly expressing ownership of the article. Whatever may be the nature of that appellation, whether fanciful, or chemically or mechanically untrue, or a proper indication of the article itself or its properties, is, I think, immaterial. The plaintiff will be protected.

Thus, in *Gout vs. Aleplogu* (6 Beavan, 69, note), the watches of the plaintiff, made for the Turkish market, were marked with his name in Turkish, and the word "*Pensendede*" (*warranted or approved.*) There was also, R. G. and a crescent, and a sprig and crescent. The defendant used the words Ralph Gout and the Turkish word, and sent his watches also to Constantinople for sale. An injunction against the use of these names and words was granted.

The leading case of *Taylor vs. Carpenter*, in our courts (reported 2 Sandf. Ch. Rep. 603), is of a similar character. The designation was "Taylor's Persian Thread." The imitation was of the same title, and also of the form and color of the spools, envelopes, &c.

So in *Burnet vs. Thalor*,¹ it was held, that if a man first adopt an appellation before unknown, and use it as indicating what he makes and sells, and by usage has attracted custom, he is entitled to protection. "Burnett's Cocoane," was the title of the plaintiff's hair wash. "Phalon & Sons' Cocaine," was that of the defendant. An injunction was granted.²

It is quite true that in these cases we have the additional fact of the use of the proper name of the party, as well as his devices. But if the doctrine sometimes advocated is true, the injunctions ought not to have included the words "Pensendede," or "Persian," or "Cocaine," in the cases respectively.

In *Wolf vs. Goulard* (18 Howard Pr. Rep. 64), Mr. Justice Ingraham's language covers the proposition: "When a person forms a new word to designate an article made by him, which has never been used before, he may obtain such a right to that name, as to entitle him to the sole use of it, as against others, who attempt to use it for a similar article. But such an exclusive right can never be successfully claimed of words in common use previously as applicable to similar articles."

And the evidence in the case satisfied the court the word "Schnapps" was in common use in Schiedam to designate gin. Hence there could be no exclusive right to the phrase "Aromatic Schiedam Schnapps." It was merely the proper name of the article.

Hine vs. Lart, before Vice-Chancellor Shadwell (10 London Jurist, 101, 1846), is another case of no little pertinence. The right claimed by the plaintiff was to the use of the word "Ethiopian," in a light gray color, upon black cotton stockings, with certain black lines above it. The imitation by the defendant was very close. Though the evidence as to the plaintiff's right to the mark was unsatisfactory, the fraud of the defendant induced the Vice-Chancellor to refuse to dissolve the common injunction, which had been obtained; and he directed the plaintiff to bring an action at law to try his right to the mark.

If the term "Ethiopian" meant merely black, there would have been no right. It was protected because it was fanciful.

¹ Before Mr. Justice Pierrepont, 19 Howard Pr. Rep. 530.

² Judgment was subsequently recovered.

It was fictitious, though not foreign to the appearance of the article.

In *Williams vs. Johnson* (1 Bosworth's Rep. 1), the question was left open for the proofs on the trial to determine whether the name "Genuine Yankee Soap" was to be deemed descriptive of the kind of soap which any one may make and sell by its proper name, or terms properly designating the plaintiff's manufacture, and so descriptive of their peculiar skill in making an article in common use by its known generic name of soap. Labels or devices similar to those of the plaintiff were used by the defendant; and an injunction was sustained.

As the author was one of the judges in the case, it may be proper to say that my own opinion was, that the term "Genuine Yankee Soap" could be the proper subject of appropriation as a trade-mark. It was very proper, however, to allow the question of its adverse appropriation to be tried in the action. The decision was submitted to. No order was entered.

The case of *Perry vs. Truefitt* (6 Beavan, 66), has been much commented upon, and, I apprehend, has been much misunderstood. A certain unguent, called "Perry's Medicated Mexican Balm," prepared and sold by the plaintiff, had obtained repute. The defendant sold an unguent for the same purpose, called "Truefitt's Medicated Mexican Balm." The evidence showed that the defendant did not attempt to sell his own as the plaintiff's unguent, or to induce the public to believe so. The question first was, whether the legal right had been made out. But next, it appeared that the plaintiff had represented his compound to be the work of a German chemist of high reputation. The motion was ordered to stand over, with liberty to the plaintiff to bring an action. Some months afterwards, the bill was dismissed, with the plaintiff's consent. The language of Lord Langdale is, "that the plaintiff's conduct did not give him a claim to the interference of the court, until he had established his legal right, which, however, I do not deny he may have."

Thus, the false representation merely induced the court to refuse an injunction *then*. The inference is irresistible that, if the title had been made out at law, the injunction would have been allowed. And if, as matter of law, there could not be a right acquired in such a combination of words as a trade-mark, the

cause ought not to have been retained, nor any step in it sanctioned.

In *Fettridge vs. Wells* (13 Howard's Pr. Rep. 385, and 4 Abbotts' Rep. 144), Mr. Justice Duer held that a trade-mark right could not be acquired in the term "Balm of a Thousand Flowers," applied to a liquid perfumed soap. Judge Duer said: "It is not necessary to deny that a name may, in some cases, be rightfully used and protected as a trade-mark; but this is only true when the name is used merely as indicating the true origin or ownership of the article offered for sale; never where it is used to designate the article itself, and has become, by adoption and use, its proper appellation. When a new preparation or compound is offered for sale, a distinctive and specific name must necessarily be given to it. The name thus given to it, no matter when or by whom imposed, becomes, by use, its proper appellation, and passes as such into our common language."

Mr. Justice Hoffman, in *Fettridge vs. Merchant* (4 Abbotts' Rep. 158), upon nearly the same facts, thought that this term, "Balm of a Thousand Flowers," could become the subject of an exclusive right. The proper generic term for the article in question was Liquid Soap, or Perfumed Liquid Soap. This, it might be, could not be appropriated, but a name so purely fanciful and arbitrary could properly be so.

It appears that the question upon this same article was before one of the courts of Boston (*Fettridge vs. Rice*); and it was also before a court in Maryland. The learned judge in the case in Boston treated the title "as the proper name and appellation of the article." In the case in Maryland, Judge Giles considered it to be "a fancy name, not one representing the ingredients or composition of the preparation." He concluded that there was no original appropriation by the plaintiff. (4 Abbott, 160.)

It may be remarked that "when, by adoption and use, a name has become the proper appellation of an article, and has passed as such into our common language," there is no pretence for an exclusive right to such a name. Soap, ointment, are terms of this character. We may go further and say that some terms, such as *Castile Soap*, though given from its original place of manufacture, has grown to be generic. But a phrase such as the Balm of Gilead, so long the miracle of quack success, was never

known to the language until the inventor appropriated and applied it to his sovereign panacea. Would he, after twenty years' use, have been denied protection from interlopers? I think not.

So, the "Balm of a Thousand Flowers," of itself, and apart from the point of deception (which is distinct and kept distinct by the Justice Duer), is a term never before used in our language and in the United States, as far as the proofs went, until employed by Dr. Fontaine in 1846. Its use in other languages is alluded to in the report. (4 Abbott, 160.)

In the case of *Genin vs. Chadsey* (Superior Court, Special Term, 1861, Hoffman, Justice), the plaintiff, or those from whom he purchased, had made use of the sign "Live and Let Live," at the doors of an eating saloon, No. 214 Broadway, for a period of seventeen years. The defendants, having a saloon next door under another name for about eight years, put up the same sign of "Live and Let Live," at their entrances. The boards were similar in shape and form. It was considered a clear case of right and violation. The same name was used at three other similar establishments, but at very remote parts of the city.

The term "Essence of Anchovies" is a marked illustration of the distinction I think exists. That name was the proper name of the article. (*Burgess vs. Burgess*, 17 En. L. & Eq. Rep. 257.)

Another question appears unsettled, and was discussed by Mr. Justice Duer in *Fetridge vs. Wells*, and by Mr. Justice Hoffman in *Fetridge vs. Merchant ut supra*. It is how far the quackery of the plaintiff and his deception of the public by a name false, in the sense of indicating the sources and properties of the article, and gross exaggeration of its benefits, will disentitle a party from staying another palpably plundering his designation.

The difference between Mr. Justice Duer and Mr. Justice Hoffman upon this point is this: The former holds that if the plaintiff seeks protection for what is untruly represented as a product or combination of certain articles, and is a manifest deception of itself, however harmless, it will not be given to him, however gross may be the conduct of the defendant in stealing the name. Because the liquid soap named "Balm of a Thousand Flowers," had no claim whatever to the title indicated, came from flowers only through the indirect mode of the honey extracted by bees, therefore the defendants could use the title with impu-

nity, whenever the success attending the untruth or imposition, so to term it, made it worth his while. Mr. Justice Hoffman held, that if the article was innocuous, a chemical untruth in its name, and a gross extravagance of panegyric, should not deprive the party of a right to protection, when the defendant was clearly an interloper. "If he had deliberately, without any previous connection with the particular business, but solely to break in upon the trade of another, and profit by the notoriety obtained by him, used the distinct and known emblems and appellations of that other, he ought not to be allowed immunity. The question should be judged of solely as between the immediate parties, and the public should be left to its own guardianship.

Now, in *Partridge vs. Menck* (Howard's Appeal Cases, 547), so much relied upon by Judge Duer, the plaintiff had not adopted any new and unused symbol or name, but had continued to use one ("Golsh Friction Matches"), which had indicated the previous manufacture of another person, and which the learned Judge Duer admits deceived the purchasers, though they were not defrauded, for the matches were of equally good quality. He had purchased Golsh's secret, but had no right to use the name.

In *Sykes vs. Sykes* (3 Barn. & Creswell, 541), the term "Sykes' Patent" was improperly used by the plaintiff. A patent had been obtained by his father, but it had been held to be invalid. It was a misrepresentation, therefore, to use such an appellation. Yet Mr. Justice Bayley left it to the jury to determine whether the defendants adopted the mark in question for the purpose of inducing the public to suppose that the articles were manufactured by the plaintiff.

In *Piddings vs. Howe* (8 Simons, 479), the trade-mark of the plaintiff was "Houqua's Mixture." The defendant employed the same term. The plaintiff had made, in his public advertisements, as to the mode of procuring and making up his mixture, statements wholly false, as to Houqua in Canton being the manufacturer of the tea. The Vice-Chancellor refused to allow an injunction, until he should establish his *title at law*.

Flavel vs. Harrison (19 En. L. & Eq. Rep. 15), was a case of the adoption by the plaintiff of the term "Flavel's Patent Kitchener." His grates were stamped with this name. He had never

obtained a patent. The defendant had been in his employ and obtained copies of his plans. He commenced the manufacture of grates on his own account, and stamped them with the same name. The court held that the misrepresentation as to the patent was so far fraudulent; and looking also to the lapse of time, the court would not interfere summarily by injunction. Therefore the bill was retained for six months, with liberty to the plaintiff *to bring an action in the mean time*.

Perry vs. Truefitt (6 Beavan, 66) is before fully stated. The very important part of the decision that the bill was retained, shows that it was not deemed a conclusive answer to the plaintiff's right, that he had made his gross misrepresentation as to the German chemist's agency.

In *Croft vs. Day* (7 Beavan, 84), Lord Langdale, who decided *Perry vs. Truefitt*, observed that in some cases injunctions were granted at once, in others, such as *Perry vs. Truefitt*, not until the right was established at law.

In *Holloway vs. Holloway* (13 Beavan Rep. 209), the title of the plaintiff's nostrum was "Holloway's Pills and Ointment," and his advertisement was the most extravagant representation of the curative effects of the medicine. The defendant called his medicine "H. Holloway's Pills and Ointment." The Master of the Rolls (Lord Langdale) was decided in granting the injunction, treating it as a very clear case. Counsel had cited and commented on his own decision in *Perry vs. Truefitt* very fully, as also the case of *Piddings vs. Howe*.

In *Stuart and others vs. Smithson* (1 Hylton's Rep. 119), on appeal to the General Term, from an order of Justice Woodruff, denying liberty to amend an answer, it appeared that the plaintiffs were manufacturers of a thread called "Hall and Moody's Patent Thread," and marked "Barnsley." The thread was known in the market by that name, and it had been used by the plaintiffs for a number of years. The defendants were using the same mark upon thread sold by them. The answer contained general denials.

After issue, the defendants applied to amend, by stating that the plaintiffs' mark was false and fraudulent; that the thread was not patented, and no patent for such thread had ever existed. Nor was the thread manufactured by Hall & Moody, nor

at Barnsley. The motion was denied, on the ground that the proposed amendments constituted no defense. They contained nothing meritorious, and did not amount to a strictly legal answer to the plaintiffs' claim.

And so, in *Dale vs. Smithson* (Common Pleas, Gen. Term, Feb. 1861), it was objected that the name "Thomas Nelson & Co." was entirely fictitious; no such firm existed. The plaintiffs were passing off their thread as made by another, and were thus practicing a deception upon the public. The title had been established at the trial, and the court held that the use of the fictitious name did not deprive the plaintiff of his right of action. *Perry vs. Truefitt* and *Piddings vs. Horn* were cited, and the fact noticed as of moment, that the representations only prevented the immediate allowance of the injunction; that a trial at law was first to be had. Thus clearly leaving it to be inferred, that when the legal right had been so established, the protection would be afforded.

Upon these authorities, it is far from being clear, that any amount of extravagant praise of the virtues of an article, any mere exaggeration of quackery, any mere false statement, in a chemical or mechanical sense, of the sources of the article, if it is of itself innocent, is enough to prevent a party having the relief which, but for these circumstances, he would have. An absolute falsehood in attributing the authorship to one of known repute in the business, may present a different and peculiar case.

3d. The next point in Lord Cranworth's opinion is, that one mode of redress attending the possession of the right is, "to prevent others from selling wares which are not his" (the owner of the mark), "marked with such trade-mark, in order to mislead the public, and so incidentally to injure the person who is the owner of the mark."

The leading test here stated is, the selling wares not owned or made by the proprietor of the mark, under the same mark, *in order* to mislead the public. It may be suggested, that it would be more accurate to say, *so as* to mislead the public; because there are certainly cases in which innocence of intention does not protect a defendant.

In *Burgess vs. Burgess* (17 En. L. & Eq. Rep. 257), Lord Jus-

tice Turner said: "It is clear that no man can have any right to represent his goods as the goods of another; but in all cases of this kind it must be made out that the defendant is selling his own goods, as the goods of another. When a person is selling goods under his own name, and another person, not having that name, is using it, it is clear that he so uses it to represent the goods sold by himself as the goods of another."

Perhaps the true rule is nowhere better expressed than in the argument of Mr. Wigram and Mr. Parker, in *Motley vs. Downman* (3 Mylne & Craig, 13). "When a man makes use of a mark which another has previously appropriated to goods of his own, and he knows that the world will be deceived, the court will presume fraud. *Sykes vs. Sykes* proves this. It is clear, that when a mark on goods has been used by one man, and the public has acquired a knowledge of it, no other man can use the same mark: it is in fact writing one man's name on another man's goods. The adoption of a mark used by him, is as much writing his name, as if his surname or his initials, or any other designation by which he might be known, were employed."

It was before observed, that the right to protection does not exclusively depend upon the wilful and intentional imitation of the mark. The party may be innocent, yet the public be deceived, and the plaintiff injured. Such a case is within the careful language of Lord Justice Turner, in *Burgess vs. Burgess*, *ut supra*. The case of *Millington vs. Fox* is directly in point; and in *Coffeen vs. Brunton* (4 McLean's Rep. 516), Mr. Justice Woodbury admits this to be the rule.

But the most marked and the most usual case is, where the mark is designedly adopted to mislead the public, and to injure the plaintiff. The courts, especially of late, certainly lean to the conclusion, that the intention was to injure the plaintiff, when the imitation is so marked as to deceive the public.

It is not the rule that a specific use of the plaintiff's name or mark *modo et forma*, is necessary to entitle him to an injunction. The court is to be judicially satisfied that the defendant has contrived to make it appear to the public, that the thing sold by him has been prepared by the plaintiff.

Lord Langdale, in *Croft vs. Day*, says: "Was this a contrivance calculated to mislead the bulk of unwary purchasers, and

thus to benefit the defendants, to injure the plaintiffs, and to deceive the public?"

So in *Clark vs. Clark* (25 Barbour, 76), it is well stated, "that an imitation of the mark with partial differences, such as the public could not observe, does the party the same harm as the entire counterfeit. If the wholesale purchaser, most conversant with the mark, is not misled, but the small retailer or consumer is, the injury is the same in law, and differs only in degree."

Mr. Justice Bayley, in *Sykes vs. Sykes* (3 Barn. & Cress. 541) puts the question to the jury, whether the defendants adopted the mark in question for the purpose of inducing the public to suppose that the articles were manufactured by the plaintiffs, not by themselves.

The test, as stated by Vice-Chancellor Sandford in *Partridge vs. Mench* (2 Sandf. Ch. Rep. 622), has been generally approved: "Although the court will hold any imitation colorable, which requires a careful inspection to distinguish its marks and appearance from those of the manufacture imitated, it is certainly not bound to interfere where ordinary attention will enable a purchaser to discriminate. It does not suffice to show that persons incapable of reading the labels might be deceived by the resemblance. It must appear that the ordinary mass of purchasers, paying that attention which such persons usually do, would probably be deceived.

In *Francke vs. Weaver* (10 Beavan, 294) the differences in the labels and wrappers, and words used, were considerable. Yet there was such a crafty adaptation of them as to make it difficult for an ordinary person, not examining them critically, to derive any other impression than that the thing sold was prepared by the plaintiff.

And see *Williams vs. Johnson*, 2 Bosworth's Rep. 1.

The use of distinctive emblems or devices is equally the subject of protection, when first used in connection with the article, and so long used as to become known as its indication.

Mr. Justice Woodruff, delivering the opinion of the court in *Williams vs. Johnson* (2 Bosworth, 1), says: "It is so palpable as to admit of no reasonable doubt, that the devices employed by the defendant were calculated and intended by him to secure the benefit of the reputation which the plaintiffs had acquired."

Names of hotels.—The continued use of a particular name of a hotel will entitle the party to an injunction against its adoption by another.

In *Howard vs. Henriques* (3 Sandf. Sup. Ct. Rep. 725), the Superior Court determined, that the principle on which trademarks were protected was not confined to personal property. It applies to a name appropriated to a public hotel.

The plaintiff opened a hotel by the name of the Irving House, in 1848. The defendants opened a hotel called Irving Hotel, in the summer of 1850. The plaintiff's house can come to be known as the Irving House as well as the Irving Hotel. An injunction against the defendants using the name Irving Hotel was sustained. Justice Campbell, delivering the opinion of the court, says: "If one man has, by attention to the comfort of his guests, and by superior energy, made his hotel desirable for the traveler, and caused its name to become popular throughout the land, another man ought not to be permitted to assume the same name in the same town, and thus deprive him who first appropriated the name, of some portion of the fruits of that good-will which honestly belongs to him alone."

4th. Another branch of the subject is, what is the mode of trying the legal right, and what shall be done while such trial is pending?

Justice Duer (2 Sandf. S. C. Rep. 607) says: "That when the title is disputed, the course is to let the motion stand over until the plaintiff has established his legal title at law. By our present practice under the Code, he could not direct an action at law to enable the plaintiff to establish his right, for the present suit was such an action. Every complaint was at once a declaration at law, and a bill in equity. I can give the defendant, however, the benefit of the general rule, by so modifying the injunction as not to restrain him from using the letters A. C. A until the legal right of the plaintiff shall have been established by a verdict of a jury in this suit—a course which I should be bound to follow, even if my opinion as to the legal right was widely different from that which I have expressed."

Lord Cottenham, in *Mottley vs. Downman* (3 Mylne & Craig, 1), says: "The court, when it interferes in cases of this sort, is exercising a jurisdiction over legal rights; and although, some-

times, in a very strong case, it interferes in the first instance, by injunction, yet, in a general way, it puts the party upon asserting his right by trying it in an action at law."

In *Perry vs. Truefitt* (*supra*) the bill was retained, the plaintiff to bring his action within six months.

In *Piddings vs. Howe*, a similar course was taken. And see *The Merimack Manufacturing Co. vs. Garner* (4 E. D. Smith, 387; 2 Abbotts' Rep. 318.)

But it is plain that, if the court will not grant an injunction in cases where the right is not apparent, and that right is to be settled by a trial, great injury may sometimes be done to the plaintiff in the interim, should he ultimately succeed. It would be difficult, often impossible, to prove the damages by the extent of the sales. Hence, in *Fetridge vs. Merchant*, *ut supra*, the order was, that the injunction order be discharged upon the defendants entering into an undertaking, in the penalty of \$2,500, to keep an account of their sales, and render such account, and pay the amount when required by order of a court of competent jurisdiction.

In an analogous case, *Wilkins vs. Atkin* (17 Vesey, 422), Lord Eldon said: "The court, when a fair doubt appears as to the plaintiff's legal right, always directs it to be tried, making some provision in the interim, the best that can be, for the interest of the parties." The course there adopted was an order that the work might be sold in the mean time, the defendant undertaking to account according to the result of the action.

And in *Shottiswood vs. Clark* (2 Phillips, 154; 10 London Jurist, 1043), the injunction was dissolved, the defendant undertaking to keep an account, and the plaintiff to bring an action.

When the fraud is apparent, and the right seems to the court well founded, there are cases in which an injunction is essential, or no adequate redress can ultimately be obtained.

Thus, in *Gillott vs. Kettle* (3 Duer, 626), the fraud of the defendant was in putting genuine labels of the plaintiff, used by him to denote a superior quality of pen, upon boxes containing an inferior quality, and on which the plaintiff placed a different label. The court (Justice Bosworth) said: "Fraud, and damage resulting from it, always entitles the injured party to relief. The remedy by injunction is always granted when the nature of the injury is such that a preventive remedy is indispensable, and

should be permanent. It is obvious that, in cases like this, if the injured party is obliged to seek redress by actions to recover damages, there will be no end to litigation, and certain and adequate relief must be unattainable."

So, in *Genin vs. Chadsey* (*ut supra*, p. 245), Justice Hoffman said: "It is obvious that, if the plaintiff had any right, it could only be effectually protected by an injunction." He then quotes the above language of Justice Bosworth, as applicable.

Upon this subject it would be, as it seems to me, inaccurate to treat this as more than a general, but very flexible, rule. The observations of Lord Cottenham, upon the analogous case of copyright,¹ are very pertinent: "This court exercises its jurisdiction, not for the purpose of acting upon legal rights, but for the purpose of better enforcing legal rights, or preventing mischief until they have been ascertained. In all cases of injunctions, in aid of legal rights, whether it be patent-right, copyright, or some other description of legal right, which comes before the court, the office of the court is consequent upon the legal right; and it generally happens that the only question the court has to consider is, whether the case is so clear and so free from objection, upon equitable considerations, that the court ought to interfere by injunction, without a previous trial at law, or whether it ought to wait till the legal title had been established. That distinction depends upon a great variety of circumstances, and it is utterly impossible to lay down any general rule by which the discretion of the court ought in all cases to be regulated."

And in *Macon vs. Jones* (4 Mylne & Craig, 433), he stated general rules, which are applicable to a great mass of cases, as well as to those now considered.

The same judge, in *Prince Albert vs. Strange* (1 Hall & Tuell's Ch. Rep. 1, see p. 26), refers to the cases before him upon this general point of legal title, and says: "But even in the cases referred to, I have always held that it was for the discretion of the court, to consider whether the defendant might not sustain greater injury from an improper injunction, than the plaintiff from delay in granting it."

¹ In *Saunders vs. Smith*, 3 Mylne & Craig, 711.

8. Miscellaneous.

[A] *Editor and publisher.*

In *Crooke vs. Potter* (at the Rolls, 1860), on a motion for an injunction the Master of the Rolls said :

“ I am of opinion that I cannot accede to this motion. The motion asks that the defendants may be restrained by injunction from doing three things : first, from interfering with the plaintiff in his editorial capacity ; secondly, from publishing any copy or number of the journal with any heading or title differing from that under which it had hitherto been published ; and thirdly, from publishing the journal without publishing therein the name of the plaintiff as editor. I will consider these points *seriatim*. No one can concur more completely than I do in the doctrine established by the cases, that where a person has bound himself by contract to do that which in the nature of things it is impossible to enforce, the court will restrain him from doing anything in violation of the contract into which he has entered. The first case in which this doctrine was established, was that in which a bill was filed to compel Mr. Price to furnish reports of the Court of Exchequer, and the Lord Chancellor said, ‘ How am I to compel him ? By what means is it to be done ? It is obviously impossible. I cannot imprison him until he furnishes the reports. The very nature of the case makes it impossible to grant the relief prayed. But, on the other hand, if Mr. Price has entered into a contract with certain booksellers to furnish reports for them, then I will restrain him from doing so for others.’ This is the principle applicable to all these cases, and in which I fully concur. When Mr. Dickinson applied to me in chambers *ex parte* for an injunction, I asked him if there was any part of the contract by which the defendants undertook that the name of the plaintiff should appear as editor. It appeared that there was no such stipulation in the written agreement. If it had, then I could not have enforced the contract specifically ; I would have restrained the defendants from publishing any copy of the work not containing the name of the plaintiff as editor, so long as he was willing to tender his services as editor. With respect to the first part of the relief prayed, the evidence shows that, either with the concurrence, or without any objection on the part of the plaintiff,

several alterations have been made in his articles, from time to time; whether those alterations were for the better or worse is wholly immaterial—the fact is important that such alterations were made. I am not aware of any case in which the court has sanctioned any such doctrine as that attempted to be laid down. It appears to me that it would lead to a great amount of difficulty if the owners of a copyright in a journal were bound to insert everything which the editor thought fit. Every one would admit that they would not be bound to insert any libelous matter. How is the court to draw the line, and to determine how far the owners of the copyright may interfere with the discretion of the editor? I have heard nothing sufficiently strong to induce me to say that I ought to give over the journal entirely to the control of the plaintiff, and restrain the defendants from altering the articles which he may contribute to the journal. The matter resolves itself into this: if the defendants unduly interfere with the functions of the editor, or he improperly introduces matter which is injurious to the journal, the best course is to have it settled by an action of law, and to leave it to a jury to determine the amount of the damages. The next question is, whether the court will interfere by injunction to restrain the defendants ‘from publishing any number or copy of the same journal, with any heading or title different from the heading or title under which it has been published since the date and execution of the agreement of the 17th January, 1859.’ The defendants say that they have not altered the title, and it is very difficult to say they have. It is published now under the title of the *Photographic News and Weekly Record of the Progress of Photography*. Is the name of the editor necessarily a part of the title? I have never known it so laid down, and certainly it would not be so treated in the case of a breach of copyright. It does not appear to me, therefore, that any injunction should be granted upon this part of the case. The third part of the motion goes to the same matter in a somewhat different form. It asks that the ‘defendants may be restrained from publishing the journal without publishing therein the name of the plaintiff as editor of the said journal, and without publishing therein an advertisement requiring that all editorial communications shall be addressed to the plaintiff.’ Where is the contract which requires this to be done? I turn to

the written contract, and I find nothing to warrant such an interference on the part of the court. The plaintiff has not made out such a case. On the other hand, the defendant's evidence contains a passage to the effect, that this was a matter of discussion between the plaintiff and the defendants at the time of their entering into the agreement, and was not assented to."

The injunction was denied.

In *Bradbury vs. Dickens* (27 Beavan, 53), the defendant was editor and part proprietor of the periodical called *Household Words*. It was held, that the right to use the name was part of the partnership property; and must be sold for its benefit. The defendant could not advertise a discontinuance of the name.

[B] *Where a publication is libelous*.—It seems, that if a publication, which imports that medicines or drugs sold by one, are the products of the skill of another, amounts to a libel, the court will not interfere.

In *Clark vs. Freeman* (11 Beavan, 112), the injunction prayed for was to restrain the defendant from selling, or exposing for sale, any pills or medicines described as, or purporting to be, those of the plaintiff, or from publishing or circulating any advertisements or handbills so contrived or expressed, as to represent that any medicine sold or prepared by the defendant, was so sold by him as the agent, or on behalf of the plaintiff.

The plaintiff was a physician particularly eminent for his treatment of consumptive complaints, and physician in ordinary to her Majesty. The defendant was a druggist, and had offered, and extensively advertised for sale, certain pills which he called "Sir J. Clark's Consumption Pills." Among his handbills was one to this effect: "By Her Majesty the Queen's permission. Sir James Clark's Consumption Pills;" and was signed "Agent, Mr. R. Freeman, Bennington road."

The Master of the Rolls said: "The court can interfere in cases of mischief done to property by the fraudulent misuse of the name of another, by which his profits are diminished. When the legal right is established, the court usually interferes.

"Now, supposing this publication to be an attempt to impute to a gentleman of high position and character, that he is somehow concerned in vending quack medicines, then, no doubt, it is a serious injury to him in the way of slander, and it may also be

an injury to the public. This, I conceive, would be in the nature of a public offence. If this court has jurisdiction in cases of this kind, you must first establish the offence at law. If, after that has been done, you find that an injury is thereby done to the plaintiff's property, or to his means of subsistence, or of gaining a livelihood, I will not say that the court might not interfere by injunction, and prevent the repetition of similar acts. If Sir James Clark had been in the habit of manufacturing and selling pills, it would be very like the other cases in which the court has interfered for the protection of property. I cannot grant this injunction. The course of the defendant is disgraceful; but I think the granting of an injunction in this case, would imply that the court has jurisdiction to stay the publication of a libel, and I cannot think it has."

Mr. Drewry (Supplement to Treatise on Injunctions, p. 34) says: "This decision is at least singular, and seems founded on an exaggerated idea of the impregnability of a high professional reputation. That the act of the defendant amounted to a fraudulent use of the plaintiff's name, cannot be doubted. The plaintiff might be injured in reference to his property, since, if the public believed that the pills were compounded by him, they might be induced to buy them, instead of consulting him."

In *Brandreth vs. Lance* (8 Paige, 24), the Chancellor admits that the work, the publication of which was sought to be restrained, was a gross libel upon the complainant. But in such a case he must seek his remedy by a civil suit in a court of law, or by instituting criminal proceedings.

[c.] *Works of immorality*.—It has been asserted that the court will not interfere in favor of any author, to protect him from invasion of published or unpublished works, when they are contrary to religion or morality.

This subject is one of much interest and much delicacy.

Chancellor Walworth, in *Brandreth vs. Lance* (8 Paige, 24), expressed himself in the strongest terms, against the right of the court to restrain a man from publishing a libel. He refers to the statute 2 R. S. 731, § 1, and the Revisers' note, 3 R. S. The Court of Star Chamber had once exercised the power; but he believed no judge had since attempted it. He also refers to Lord Ellenborough's statement at nisi prius, in *Du Bost vs. Beres-*

ford (2 Campbell, 511), that a court of equity would restrain the exhibition of a libelous painting; and says it must be considered as a hasty declaration, made without reflection during the progress of a trial.

The learned Chancellor allowed the case of *Burnett vs. Chetwood* (2 Merivale's Rep. 441, note) to escape his notice. Lord Chancellor Parker granted an injunction to restrain the publication of a translation of a book from Latin into English. In the former language, the strange notions of the book could do little hurt; but he looked upon it, that the court had a superintendency over all books, and might, in a summary way, restrain the printing or publishing any that contained reflections on religion or morality.

Wholly rejecting the power asserted in this case, yet the question is very different, when an author applies for the remedy of an injunction, whose work is open to the objection of blasphemy, irreligion, or immorality.

In *Hime vs. Dale* (2 Campbell, 27, n.) it was ruled at *nisi prius* that if a publication was, on its face, so gross as to affect public morals, a jury should be directed to give no damages for a violation of the copyright.

In *Walcot vs. Walker* (7 Vesey, 1) Lord Eldon said: "If the doctrine of Lord Chief Justice Eyre was right, and he thought it was, that publications may be of such a nature as that no action at law could be maintained by the author, it was not the business of the court to decree an injunction, or account of profits. It was the duty of the court to know whether an action at law would lie; for if not, the court ought not to give an account of the unhallowed profits of libelous publications. If, upon inspection, the work appears innocent, I will act; if criminal, I will not act at all; and if doubtful, I will send the question to law."

"Lord Eldon, in *Southey vs. Sherwood* (2 Merivale, 435), said: If the publication is an innocent one, I apprehend that I am authorized by decided cases to say, that whether the author did or did not intend to make a profit by its publication, he has a right to an injunction to prevent any other person from publishing it. If, on the other hand, this is not an innocent publication, in such sense as that an action would not lie in case of its having been published by the author, and subsequently pirated, I apprehend

this court will not grant an injunction. Lord Chief Justice Eyre has expressly laid it down, that a person cannot recover damages for a work which is in its nature calculated to do injury to the public."

In *Lawrence vs. Smith* (1 Jacob's Rep. 471), the plaintiff had published a work called *Lectures on Physiology and the Natural History of Man*. The bill was to restrain the defendant from selling a pirated edition. Lord Eldon delivered a remarkably clear and decided opinion. He said: "The matter comes on upon a bill stating that the plaintiff is the author of this work; that the defendant has published it, and that he is therefore entitled to the protection which courts of equity give, beyond the law, to secure to authors the profits of their publications. Our jurisdiction, unless I mistake, is founded upon this, that the law does not give a complete remedy to those whose literary property is invaded. The court therefore interposes by injunction, but not in cases where an action cannot be maintained. Looking at the general tenor of the work, and at many particular parts of it; recollecting that the immortality of the soul is one of the doctrines of Scripture; considering that the law does not give protection to those who contradict the Scriptures; and entertaining a doubt—I think a rational doubt—whether this book does not violate that law, I cannot continue the injunction. The plaintiff may bring an action."

In *Murray vs. Benbow*, Feb. 1822, a motion was made to restrain the defendant from publishing a pirated edition of Lord Byron's poem of *Cain*. The Lord Chancellor, after reading the work, refused the motion, for similar reasons as those assigned by him in *Lawrence vs. Smith* (1 Jacob Rep. 474, note).

In a case before the Vice-Chancellor, in 1823, an injunction, which had been obtained to restrain the publication of a pirated edition of portions of the poem of *Don Juan*, was dissolved on similar grounds. (*Ibid.*)

In the 76th number of the *Edinburgh Review* (May, 1822) will be found an article upon this subject, of marked ability. The views of Lord Eldon are denounced with unsparing severity, as being pernicious, despotic, and illegal; as robbing an author of the protection of his property which the law gives him, upon the solitary judgment of one man as to the tendency of a book. It

had ever before been left to a jury to say if there was libel or scandal in a publication which made its author amenable to public justice. (See the passage quoted from 17 Parliamentary Debates.)

IV.—*Persons in particular relations.*

This head is subdivided as follows :

1. Partners.
2. Corporations.
3. Public officers.
4. Receivers.
5. Assignees, trustees, executors, &c.
6. Married women.
7. Attorneys, solicitors, and counsel.

1. Partners.—It may be stated as the general rule, that where one partner is doing acts, and persists in them, inconsistent with his duties as a partner, and tending to defraud or injure his associates, he will be restrained.

And so, where one partner is violating the terms of a partnership agreement, an injunction will be allowed.

Thus, in *Hood vs. Aston* (1 Russell, 412), a partner gave to his individual creditors a bill, drawn and accepted by him in the name of the firm, without the consent of his partners, the creditors having knowledge of the fact. An injunction was allowed restraining the partner from drawing or accepting bills in the name of the firm, and restraining the holders from negotiating the bills taken by them.

So, in *Miles vs. Thomas* (9 Simons, 606), the Vice-Chancellor said he was of opinion that the court ought to interfere between copartners wherever the act complained of is one that tends to the destruction of the partnership property, notwithstanding a dissolution may not be prayed.

But it has been held repeatedly that, as a general rule, the court does not interfere by injunction, or grant a receiver, unless the party makes a case for a dissolution. This does not prevent its interdicting particular acts of misconduct.

This rule is stated in the leading cases of *Marshall vs. Colman* (2 Jac. & Walk. 266), *Waters vs. Taylor* (15 Vesey, 10), *Smith vs. Jeyes* (4 Beavan. 503).

In *Smith vs. Jeyes* (*ut supra*), it was declared that to entitle one partner to an order of injunction and receiver against his co-partner, he must either show a dissolution, or state facts which would entitle him to a decree for dissolution.

Some exceptional cases are to be found.

Thus, in *Charlton vs. Poulter* (19 Vesey, 148, n.), a bill was filed by two partners, charging the other with various acts of misconduct, which obstructed the carrying on of the business, and impaired its value; and the injunction prohibited such acts for the future.

Goodman vs. Whitcombe (1 Jac. & Walker, 589) is a similar case.

In *Loscombe vs. Russell* (4 Simons, 8), upon a demurrer to a bill seeking an account of all the monies received by the defendants from the partnership concerns since a certain time, but not asking a dissolution, the Vice-Chancellor allowed the demurrer, holding it to be the established rule that such a bill could not be sustained. Supplemental bills might be filed every year.

But, in *Walworth vs. Hoyt* (4 Mylne & Craig, 619), Lord Cottenham said that there were two rules alleged to be in force—one that a bill must ask for a dissolution; another that every partner must be made a party. The result, therefore, of these two rules would be that the door of the court would be shut in all cases in which the partners or shareholders are too numerous to be made parties, which, in the present state of the transactions of mankind, would be an absolute denial of justice to a large portion of the subjects. That rule cannot be so generally applicable as it has been supposed to be.

The bill was by shareholders of an insolvent company, established under certain acts of Parliament, was brought on behalf of themselves and all other shareholders, except the defendants, against the directors and trustees and certain shareholders, who had not paid up their calls, praying an account of the assets, a receiver to get in what was outstanding, and an application to the partnership debts. It was sustained on demurrer.

In *Richardson vs. Hastings* (7 Beavan, 301) the Vice-Chancel-

lor said: "At one time the court would not entertain a suit between partners, in relation to partnership transactions, except upon a bill to wind up the partnership. That is not now the rule of the court; for I think that the court will, as between partners, entertain a bill to settle a question which may arise between them, without proceeding to wind up the affairs."

The use of a firm name is common to the partners while they continue such. None of such partners can, after a dissolution, retain the firm name on the signs. There must be sufficient additions or alterations to give distinct notice of a change.

This was decided in *Peterson vs. Humphrey* (4 Abbotts' Rep. 394), and an injunction to prevent such a use was sustained.

If a judgment is recovered, and execution issued against one co-partner for his separate debt, the court will not enjoin the proceedings. The remedy is by the other partner, who may be injured, to proceed against the purchaser at the sheriff's sale, to ascertain the interest of the debtor acquired by him. That is, the interest after payment of the partnership liabilities, and protection of the rights of the other partners.¹

It is stated, that if it is made to appear that the debtor partner cannot have any interest in the partnership property, the injunction may be allowed. (*Mowbray vs. Lawrence*, *ut supra*, citing Story on Partnership, § 264.)

The English rule appears to be different.²

In *Newell vs. Townsend* (6 Simons, 419), the debtor partner died before the suit of execution came to the sheriff's hands. It was held that the property had vested in the surviving partner, and could not be taken. An injunction was therefore sustained.

After dissolution, if any of the partners attempt to carry on the business for their own benefit, they will be restrained. (*De Tastet vs. Bordenave*, Jacob's Rep. 516).

Where questions arise between the surviving partners and representatives of a deceased partner, an injunction will rarely be allowed, without a receiver. (See, as to this, the cases *post*, Tit. Receiver.)

¹ *Moody vs. Payne* (2 John. Ch. Rep. 548); *Phillips vs. Cook* (24 Wendell, 389); *Mowbray vs. Lawrence* (13 Abbott, 317). See *Witter vs. Richards* (10 Connecticut Rep. 43).

² *Beven vs. Lewis* (1 Simons, 376); *Lowndes vs. Taylor* (1 Madd. Rep. 423).

2. Corporations.—Injunctions to restrain the acts or proceedings of corporations, may be considered under the following heads:

First.—Under the provisions of the Revised Statutes of 1830, and the amendatory and additional acts thereto; and acts under the constitution of 1846.

Second.—As to municipal corporations.

Third.—Railroad corporations.

Fourth.—Religious corporations.

Fifth.—Foreign corporations.

First.—Under Revised Statutes, &c.

[A] *Spencer Act*, 1825.—The act of the 21st of April, 1825, called the Spencer Act, may be regarded as the first of these statutory regulations. It was entitled, "An act to prevent fraudulent bankruptcies by incorporated companies; to facilitate proceedings against them; and for other purposes."

The fifth section of that act was the model of the 30th section of the Revised Statute of 1830 (Ch. VIII., Tit. 4, Part III., 2 R. S. 461), "Of proceedings against corporations in equity," hereafter cited. The last clause of the 6th section corresponds with the 38th section of the same revised act. The 17th section is found re-enacted in section 39, with some additions.

Under the 6th section of the act of 1825, Chancellor Jones granted an injunction against the Life and Fire Insurance Company, restraining the company and its officers from doing any corporate act. He also appointed receivers, and at the instance of stockholders suing on behalf of themselves and all others, &c.

The statute had not provided for either remedy, as the company was not a banking company, nor had judgment been recovered against it. But it had declared the case in which a surrender and dissolution should be deemed to have arisen, and the common-law power of the court could apply the appropriate and competent remedy.

The case of *Lawrence vs. The Greenwich Fire Ins. Comp.* (1 Paige, 587), is an example of a similar exercise of power.

The *Franklin Bank* case (1 Paige, 85) was a proceeding under the 17th section, and upon the application of a creditor.

[B] *Revised Statutes*, § 31.—The Revised Statutes have pro-

vided an extensive system for the regulation of corporations, and among their provisions for the use of the remedy by injunction.

The 31st section of the act, "Of proceedings against corporations in equity" (2 R. S. 461), provides, "that upon a bill being filed by the Attorney-General in the Court of Chancery, the Chancellor shall have power to restrain by injunction any corporation from assuming or exercising any franchise, liberty, or privilege, or transacting any business not allowed by the charter of such corporation; and in the same manner to restrain any individuals from exercising any corporate rights, privileges, or franchises, not granted to them by any law of this State."

The 32d section directs, that such injunction may be issued before the coming in of the answer, upon satisfactory proof that the defendants complained of have usurped, exercised, or claimed any franchise, liberty, privilege, or corporate right, not granted to them; and after the coming in of the answer, such injunction may be continued until judgment at law shall have been had.

It will be observed, that the 31st section applies to the case of an injunction to restrain a corporation from assuming privileges, *or transacting business*, not allowed by its charter. Chancellor Kent, in *The Attorney General vs. The Utica Ins. Co.* (2 Johns. Ch. Rep. 389), doubted the general powers of the court over a corporation itself to prevent an abuse of corporate franchises. In *Robinson vs. Smith* (3 Paige, 222), Chancellor Walworth adverted to this doubt, and his language tends to remove it. He did hold, that before the Revised Statutes, the power of the stockholders to call upon the court to interfere against the acts of directors for fraud, or misapplication of the funds, was clear; but he also held that if the corporation refuse to sue, or is in the hands of the directors complained of, the company should still be made a party to a bill for such a purpose.

It will be also noticed, that this 31st section gives the power, upon a bill filed by the attorney-general. Is this prohibitory, by implication, of the right of any others to apply?

The case of *Robinson vs. Smith*, above noticed, was for the employment of funds in speculating in stocks, the charter being for a coal company, and the stockholders were allowed to sustain the bill.

In a number of English cases, it has been held, that the ap-

plication of funds by a company to purposes other than those within the objects and scope of the charter, may be prohibited by injunction.

Thus, in *Coleman vs. The East Counties Railway Company* (4 *Railway Cases*, 513), it was held that directors had no right to pledge the funds of the company, in support of a project not comprised within their act, although the same might tend to increase their traffic.

And in *Munt vs. Shrewsbury and Chester Railway Company* (3 *Eng. L. & Eq. Rep.* 144), Lord Langdale said: It had been absolutely decided, that companies, possessed of funds for objects distinctly defined by act of Parliament, could not be allowed to apply them to any other purposes whatever, however beneficial to the company that purpose might appear to be.

These cases are examples of attempted transactions not allowed by the company's charter—impliedly forbidden by it. And I think that this 31st section applies to all cases of a violation of duty to the public, as well as to shareholders, by deviating from the purposes for which the charter was granted, usurping powers or franchises, or performing offices or business of a foreign nature, and which powers and offices have probably been consigned to other corporations. In short, it was meant to effect by injunction what a *quo warranto* effected. The 32d section favors this view; and other provisions of the statute cover, as I think, the cases cited from the English books.

§ 39. The Revised Statutes, in the 5th subdivision of section 39 (2 *R. S.* 583), provided for the case of an injunction in the nature of a *quo warranto*, when a corporation was exercising a franchise or privilege not conferred upon it by law; and subdivision 3 of section 28 (*Ibid.* 582), provided the same remedy in cases of individuals, or associations acting as a corporation.

The sections 31 and 32 now considered, were, therefore, plainly auxiliary to these proceedings at law.

Code.—But the Code (§ 428) has abolished the writ of *quo warranto*; and the remedy is to be obtained by civil action under the provisions of the chapter. (Ch. 2.)

The 430th, 431st, and 434th sections of the Code, declare the cases in which the Attorney-General, with or without a relator, may maintain an action in cases similar to those provided for in

the Revised Statutes, and other sections regulate the course of proceeding. It seems clear, that an injunction is an auxiliary remedy to these proceedings, under the Code, as it was under the statute, and is to be granted under sections 219, 220, and 222, which last particularly applies to such injunctions.

We must notice, that in such cases under these sections of the Code, the object is to annul the charter, not to restrain unlawful acts of the agents of the corporation.

Smith vs. The Metropolitan Gas Light Company (12 Howard's Pr. Rep. 187), was a case in which an injunction had been allowed to restrain the defendants from acting under their charter, on the ground that it was void, and the action was by corporators and tax-payers of the city. The injunction was dissolved. It was declared that an action to annul a charter, and to enjoin the exercise of any of its powers until judgment, could only be brought by the Attorney-General in the name of the People. (Code, 430, *et seq.*)

§ 33. The jurisdiction conferred upon the Chancellor over directors, managers, trustees, and other officers of a corporation, was of the most extensive character, under section 33 of the statute. It may here be observed, that under the Constitution of 1846, and the Judiciary act, all the powers granted by that statute became vested in the Supreme Court.

The first subdivision of section 33 gives power to the court to compel trustees to account for their official conduct in the management of the property. By the second subdivision, they may be compelled to account to the corporation, or its creditors, for money or property acquired to themselves, or transferred to others, or lost, or wasted by any violation of their duty. By the third subdivision, they may be suspended from the exercise of their office, whenever it shall appear that they have abused their trust.

By the 7th subdivision of the 33d section, the court may set aside all alienations of property made by the trustees or any officers of any corporation contrary to the provisions of law, or for purposes foreign to the lawful business and objects of such corporation, in cases where the person receiving such alienation knew the purpose for which the same was made.

And by the 8th subdivision, any such alienation may be pre-

vented in cases where it may be threatened, or there may be good reason to apprehend it may be made.

§ 35. By the 35th section the jurisdiction conferred by the 33d section shall be exercised as in ordinary cases on bill or petition, as the case may require, or the Chancellor may direct, at the instance of the Attorney-General, prosecuting in behalf of the People of this State, or at the instance of any creditor of such corporation, or at the instance of any director, trustee, or other officer of such corporation, having a general superintendence of its concerns.

The sections now observed upon relate to illegal or fraudulent acts or transfers of the *officers* of a corporation; and it is to be noticed, that the provision that the jurisdiction is to be exercised by bill or petition, is superseded by the Code, and the form of action and proceedings must be under it.

It is next to be noticed that the 35th section directs that the court is to act at the instance of the Attorney-General, if a creditor of the corporation, or of any director, trustee, &c. Stockholders are not enumerated.

Does the specification of those who may commence this proceeding exclude all others?

In numerous cases it has been held that a corporation may sue in its own name to rescind illegal transactions or transfers made by its former officers, acting on its behalf.

The old and still leading case of *The Charitable Corporation vs. Sutton* (2 Atkyns, 400), and the case of *The Mayor, &c., of Colchester vs. Louten* (1 Ves. & Bea. 226), recognize this right.

In *The Attorney-General vs. Wilson* (1 Craig & Phillips, 1), Lord Cottenham held, that certain alienations of the corporate property were illegal and void; and said, "What the present plaintiffs, the corporation, complain of is, that certain persons, members of the corporation at a former time, fraudulently and illegally used the power of the corporation for the purpose of depriving it of its property. It is true, that in future the Attorney-General may assert the right of the public in an information; but if, before the act passed, the corporation might institute a suit for the purpose of setting aside transactions fraudulent against it, that right cannot be affected by the Attorney-General having also the power to complain of the transaction."

In *Mozley vs. Alston* (1 Phillips' Rep. 790), the Lord Chan-

cellor said: "The complaint against the defendants is, that they are illegally exercising the powers of directors, and illegally retaining the seal and property of the company. That, if it be an injury at all, is an injury not to the plaintiffs personally, but to the corporation of which they are members; a usurpation of the office of directors, and therefore an invasion of the rights of the corporation; and yet no reason is assigned by the bill, why the corporation does not put itself in motion to seek a remedy."

The Lord Chancellor cites, with decided approval, the case of *Foss vs. Harbottle* (2 Hare). That stated a case of malversation in the directors, which was properly a subject of equitable relief. The plaintiffs sued, not in their individual characters only, but in behalf of themselves and all the other shareholders, except a few who were made defendants; but the Vice-Chancellor, after examining all the authorities, decided that such a bill could not be supported; and as one of the reasons for coming to that conclusion, he said that, for anything that appeared to the contrary, there existed the means of rectifying what was complained of, by a suit in the name of the corporation.

Again, I apprehend that it is quite clear that, under the qualification stated in *Mozley vs. Alston*, and *Foss vs. Harbottle* (*ut supra*), stockholders can bring an action to set aside illegal acts or transfers of directors, particularly if brought on behalf of themselves and all others in the same situation. It is probably essential to make the company a party.

This was, in effect, admitted by Chancellor Kent in *The Attorney-General vs. The Utica Insurance Co.* (2 Johns. Ch. Rep. 380); was expressly decided in *Robinson vs. Smith* (3 Paige, 222); was recognized in *Ogden vs. The North River Bank* (6 Johns. Rep. 160); and again, by Chancellor Walworth, in *Verplanck vs. The Mercantile Insurance Co.* (2 Paige, 438-451). The Chancellor speaks of bills being frequently exhibited in the court by stockholders against the individual directors of a company, to restrain them from violating their trust. See, also, *Verplanck vs. The Mercantile Ins. Co.* (1 Edwards' Ch. Rep. 84-87.)

The English cases of *Mozley vs. Alston* (*ut supra*); *Lund vs. Blanchard* (4 Hare, 290); *Walworth vs. Holt* (4 Mylne & Craig, 619); *Ware vs. The Grand Junction Water Works Comp.* (2 R. & M. 470); *Ward vs. The Society of Attorneys* (1 Collyer, 370);

Salomons vs. Laing (12 Beavan, 377); and *Edwards vs. The Shrewsbury and Birmingham Railway* (2 De Gex & Smales, 537), are examples and authorities for the exercise of this power. In some of these cases interference was refused, but upon grounds showing the principles upon which interference could be had.

Underwood vs. The New York & New Haven Railroad Company (17 Howard's Pr. Rep. 537) may, I think, be classed under this head.

Certain persons claiming to be owners of stock in the company were allowed to sustain an injunction restraining the company from paying a dividend, on the ground that others were holders of false and fraudulent certificates. The complainant prayed that the company should not declare any dividends until the list of the true stockholders was ascertained and settled.

§ 36. By the 36th section, when a judgment at law or decree in equity has been obtained against a corporation, and an execution returned unsatisfied, the Court of Chancery could, upon petition, sequester the stock, property, and effects, and things in action of the corporation, and appoint a receiver.

§ 38. By section 38, whenever any incorporated company shall have remained insolvent for one whole year, or for one year shall have neglected or refused to pay its notes or other evidences of debt, or for one year shall have suspended the ordinary and lawful business of such corporation, it shall be deemed to have surrendered the rights, privileges, and franchises granted by any act of incorporation, or acquired under the laws of this State, and shall be adjudged to be dissolved.

This provision corresponds with part of the sixth section of the Act of 1825, called the Spencer Act, before noticed.

In the matter of *The Jackson Marine Insurance Company* (4 Sandf. Ch. Rep. 559), creditors applied for an injunction and receiver, under section 38, upon the ground of a suspension of business for one year. The Vice-Chancellor considered what would amount to a suspension. A substantial relinquishment of ordinary business was enough. The keeping up of the external organization of officers, but without clerks or agents, the keeping in force or issuing a single policy, was not conducting the business.

In *Connor vs. The Fort Henry Iron Company* (12 Barbour's Rep. 27), a lease was made by a company, which was authorized

to manufacture iron, of all its property to the president, for a period of two and a half years, by a resolution of the stockholders. The business was carried on by the lessee, in the same manner as it had been before. The lease was held void, because it suspended the ordinary business of the corporation for the period of more than one year, and this amounted to a surrender of its rights and franchises within section 38. The action was commenced in 1848, before the Code, and was by creditors of the company on behalf of themselves and all others, &c.

In *Brandt vs. Benedict* (17 N. Y. Rep. 93), it was held that section 38 was cumulative merely, and not a limitation of the common law rule previously existing in this State. To infer a surrender of corporate franchises from insolvency, or suspension of business for less than a year, the circumstances must be such as to show that the corporation has lost all power to continue or to resume its business.

In *Ward vs. The Sea Ins. Co.* (7 Paige, 294), the Chancellor explains section 38 minutely. Some of the stockholders of the company presented a petition for a receiver, and for an injunction to restrain the officers and directors from collecting, receiving, or interfering with the property or effects of the company. It was a company to take marine risks, and to lend upon bottomry and respondentia. A resolution had suspended the business of the company, and committed the management of its effects and estate to a committee; and this had been followed by a discontinuance of the usual business of insurance, &c., for a year. "The 38th section," says the Chancellor, "which contains the provision as to the suspension of the ordinary business of a corporation, and is applicable to corporations generally, does not appear to be directly connected with the four succeeding sections, which latter sections are confined to moneyed corporations, as defined in a previous part of the Revised Statutes. 1 R. S. 598, § [51]. I am of opinion that it was the intention of the legislature that, when a moneyed corporation should have so conducted itself as to have forfeited its corporate franchises, so as in law to be deemed to have surrendered them, this should be considered such a violation of the provisions of its act of incorporation as to authorize proceedings on the part of any of the stockholders under the 37th and 40th sections of the same article."

See the case, also, upon the point of an intentional neglect to hold an election as prescribed by a charter.

§ 39. The 39th section (2 R. S. 464) provides for another class of cases, viz. : whenever any corporation, having banking powers, or having the power to make loans on pledges or deposits, or authorized by law to make insurances, shall have become insolvent, or unable to pay its debts, or shall have violated any of the provisions of its act or acts of incorporation, or of any other act binding on such corporation, the Court of Chancery (Supreme Court) may, by injunction, restrain such corporation from exercising any of its corporate rights, privileges, or franchises, and from collecting or receiving any debts or demands, and from paying out, or in any way transferring or delivering to any person any of the moneys, property, or effects of such corporation, until such court shall otherwise order.

§ 40. And the 40th section directs that such injunction may be issued on the application of the Attorney-General, on behalf of the State, or of any creditor or stockholder of such incorporation, on bill or petition filed for that purpose, and upon due proof of any of the facts in the last section required to authorize the issuing of the same.

Moneyed.—The Revised Statutes contain another important series of provisions relative to “moneyed corporations.” (1 R. S. 588, *et seq.*) The definition is found in the 51st section. (1 R. S. 598.) The term “moneyed corporation,” as used in this title, shall be construed to mean every corporation having banking powers, or having the power to make loans on pledges or deposits, or authorized by law to make insurances.

By the 52d section, the provisions of the title were not to apply to any corporation existing on the 1st of January, 1828, but should be construed to apply to every moneyed corporation created, or whose charter should be renewed or extended after that time, unless such corporation should be expressly exempted from the provisions of the title in the act creating, renewing, or extending such corporation. (1 R. S. 598.)

The various prohibitions upon acts of the directors of such a corporation, are contained in section 1. Section 8 avoids conveyances of property exceeding \$1,000 in value, unless authorized by a previous resolution of the board of directors, with an excep-

tion in favor of a purchaser for valuable consideration, without notice.

By the 9th section no conveyance, nor assignment, nor payment made, judgment suffered, lien created, or security given by any corporation, when insolvent, or in contemplation of insolvency, with the intent to give a preference to a particular creditor over other creditors, shall be valid in law; and every person receiving such shall be bound to account to the creditors, stockholders, or trustees.

The act of April 2, 1829, provided, in its first section, that every moneyed corporation having banking powers, thereafter to be created in the State, or whose charter should be renewed or extended, should be subject to the provisions of such act.

By the 18th section, if the commissioners (Bank Commissioners appointed by the 15th section) should ascertain that any of such corporations are insolvent, or shall have violated any of the provisions of their acts or act of incorporation, or any other act binding on such corporations, the said commissioners shall immediately apply to the Court of Chancery, upon bill or petition, for an injunction against such corporation and its officers; and the same proceedings shall in all respects be had, and the court shall possess the like powers upon such application, as are provided by law in respect to such applications when made by the Attorney-General, or by any creditor.

The 28th section provides for proceedings against the corporation by the commissioners, and its dissolution as an insolvent corporation, for the various violations or omissions of duty enumerated in it.

In the case of the Bank Commissioners *vs.* The Bank of Buffalo (6 Paige, 49), we have an example of a proceeding by the commissioners under the 18th section, before cited, and the article of the Revised Statutes relative to proceedings against corporations in equity. The provision of subdivision 9 of section 1 (1 R. S. 590), prohibiting loans or discounts to the directors of a corporation, were applicable to the corporation itself, so as to warrant proceedings against it. By the charter of the bank the provisions of the act were made applicable. The acts of the board of directors were the acts of the corporation. Loans and discounts from corporate funds must be treated as loans made by

authority of the directors, unless fraud or embezzlement in individual officers was shown. The Chancellor could, with the consent of the Bank Commissioners, dissolve any temporary injunction which may have been granted, and permit the company to resume its business, if satisfied of its solvency and integrity of its officers, if this could be done without injury to the public, and with safety to the stockholders and creditors.

Johnson vs. Bush (3 Barbour's Ch. Rep. 207) was a case of an assignment of property of over \$1,000 in value, alleged to have been made without a previous resolution, under section 8 (1 R. S. 571), and also of its being in effect a surrender and cancelment of a subscription to the capital stock. The company was an insurance company.

It was held by Vice-Chancellor Whittesley, and by the Chancellor, that the transfer was void under sub. 2 of § 1 of Title II. (1 R. L. 589), as a withdrawal of part of the capital stock.

The Chancellor said, that if there were any creditors or stockholders who had not participated in violating the laws of the State, they could apply under section 39 (2 R. S. 464) for a receiver to collect and distribute the effects; or he might be appointed on application of the Attorney-General.

In *Brower vs. Harbeck* (1 Duer, 114; 5 Selden, 589), the Pelican Ins. Co., as a moneyed corporation, was subject to the provisions of chapter 18 (1 R. S. 589, &c.), with certain exceptions, from which it was, by its charter, exempted. The ninth section of title 11 (1 R. S. 591) was in question. The plaintiff was receiver of the company. The point was as to the transfer being received with knowledge of insolvency, or when it was notorious.

It was decided, that if the company was actually insolvent, the transfer was void, whether the assignee was ignorant of it or not. He could not become a purchaser for value. His debt revives, and he becomes a creditor, to share equally with others in the property. This rule was also applicable if the transfer was made in contemplation of insolvency, followed by actual insolvency. Insolvency was defined to be, a general inability to answer, in the course of business, the liabilities existing, and capable of being enforced.

Title IV., ch. 18.—Title IV. of ch. 18, contains also some pro-

visions of importance. It is headed, "Special provisions relating to certain corporations." (1 R. S. 601.)

The 2d section declares that dividends are to be made from surplus profits only, forbids a reduction of capital, forbids the discounting of notes taken for installments on stock, or to discount any note with the intent of enabling a stockholder to withdraw any part of the money paid in by him for his stock. For a violation of these provisions, the directors are made liable.

By the 4th section, whenever any incorporated company shall have refused payment of any of its notes, or other evidences of debt, in specie, or lawful money of the United States, it shall not be lawful for such company, or any of its officers, to assign or transfer any of the property or choses in action of such company to any officer or stockholder, directly or indirectly, for the payment of any debt; and it shall not be lawful to make any transfer or assignment, in contemplation of the insolvency of such company, to any person or persons whatever; and every such transfer or assignment to such officer, stockholder, or other person, or in trust for them or for their benefit, shall be utterly void; and whenever any incorporated company shall have remained insolvent for one whole year, or for one year shall have neglected or refused to redeem its notes or other evidences of debt, in specie or other lawful money of the United States, or shall for one year have suspended the ordinary business of the corporation, such company shall thereupon be deemed to have surrendered the rights, privileges, and franchises granted by any act of incorporation, and shall be deemed to be dissolved. (1 R. S. 603.)

By the 11th section, the provisions of this (the 4th title) were not to apply to any incorporated library, or religious society, nor to any moneyed corporation which shall have been, or shall be, created, or whose charter shall have been renewed or extended, after the 1st of January, 1828, and which shall be subject to the provisions of the second title of this the 18th chapter.

Bowen vs. Lease (5 Hill, 224) settled that the New York and Erie Railroad Company was subject to the provisions of the 4th title of chapter 18. It was expressly subjected to those of title 3. But this did not exclude the other applying and controlling.

In *Robinson, Receiver, vs. The Bank of Attica* (21 N. Y. Rep. 406), the Hollister Bank was an association organized under the

General Banking Act. A transaction and negotiation took place on the 28th of August; on the 29th, the Bank became insolvent. On the 30th, it made a transfer of certain securities to the defendant in discharge or security of the debt, arising from the transaction of the 28th. On the 1st of September this was accepted. The Receiver brought his action to recover the value of the property; an injunction had been issued against the Hollister Bank from transacting any business.

The case was decided upon section 4 of title 4, chapter 18, before cited. These were transferred by the Bank to the defendants in anticipation of the insolvency of the former; and by the statute such transfer was void, if the Hollister Bank was subject to the title and section referred to.

Harris vs. Thompson (15 Barbour, 62) was the case of a judgment recovered, and then an assignment of all the real and personal property of the Astorgan Company, a manufacturing corporation, in trust, to pay all the creditors ratably. It was admitted to have been made in contemplation of insolvency, and was adjudged void.

In *Abbott vs. The Hard Rubber Company* (11 Abbotts' Rep. 204), a sale of all the movable property of a manufacturing corporation was restrained, at the instance of a stockholder. The effect of the transfer was to dissolve the corporation. Notes were taken in payment. The directors could not thus defeat the whole object and purposes of the body.

In *Galne vs. The United States Sugar Refining Company* (13 Abbotts' Rep. 211), an insolvent manufacturing corporation was attempting to give creditors a preference, by suffering them to get judgments against the company. The creditors were enjoined in an action by one creditor, to dissolve the corporation. But the judgments were allowed to be entered, to stand as security.

[c] *Act of 1838*.—The Legislature, on the 18th day of April, 1838, passed an act to authorize the business of banking. It is sufficient, for the purpose of this work, to notice that by the 27th section, if an association neglected to make out and transmit the half-yearly statement directed in section 26, or should violate any of the provisions of that act, such association might be proceeded against, and dissolved by the Court of Chancery, in

the same manner as any moneyed corporation might be proceeded against and dissolved.

The 26th section was repealed by section 5 of the act of May 26, 1841. The substituted regulations require the statements to be made to the Bank Commissioners yearly, on the 20th of January. By the 3d section, every association that should neglect to make out and transmit the statement, as required by the first section, might be proceeded against and dissolved as an insolvent association, and every individual banker who shall so neglect, might be restrained from the further prosecution of his business.

In *Leavitt vs. Blatchford* (17 N. Y. Rep. 521), Justice Harris thus stated the result of *Curtiss vs. Leavitt* (15 N. Y. Rep. 9): "Thus, the question, whether the provisions of the Revised Statutes, relating to the insolvency of moneyed corporations, are applicable to associations formed under the act of 1838, was, in *Curtiss vs. Leavitt*, left undecided; and as the trust deed now in question was made to secure obligations issued in payment of pre-existent debts, and at a period when the affairs of the company were becoming more desperate, these provisions are again invoked, and the court is asked to pronounce against the validity of the transaction, on the ground that they have been violated.

"It will be convenient, before noticing any other question, to determine whether banking associations, organized under the general banking law of the State, are subject to the provisions of the Revised Statutes relating to moneyed corporations."

After an extended examination, the learned Judge concludes: "I am satisfied that the Legislature of 1838 intended to introduce a new and independent system of banking, and to establish for the government of institutions organized under such system, new and independent regulations, and to leave all previous statutes relating to moneyed corporations, to be applied to the chartered banks then in existence."

The points actually decided were, that the 8th and 9th sections of the article relating to moneyed corporations, as to a previous resolution, or a transfer in preference, were not applicable.

In *Tracy vs. The North American Trust and Banking Comp.* (August, 1841, cited in *Cleveland's Banking Laws*, p. 59, n.), a company formed under the general banking law, was restrained

by injunction from exercising any of the rights and privileges of such an association, and from paying out or otherwise transferring any of its property, &c. Tracy, the plaintiff, was both a creditor and a stockholder. The order for the injunction recited that it appeared by the bill (among other things) that the said association was insolvent, and unable to meet and discharge its debts as they became due and payable; and had violated the provisions of the said act (the general banking law) and of the acts amending the same. This order was made under the 39th section of the act as to proceedings in equity against corporations, before cited.

See, also, *Mayer vs. Talmage* (4 Kernan, 165); *Bosgerard vs. The New York Bank Co.* (2 Sandf. Ch. Rep. 23) is to the same effect. See, also, *Sagory vs. Dubois* (3 Sandf. Ch. Rep. 166).

In these cases, especially the last, the Vice-Chancellor stated as the law, that such associations were liable to the provisions of the law in respect to moneyed corporations. In this he is mistaken; and I quote the language of Justice Paige in *Curtis vs. Leavitt* (15 N. Y. Rep. 180), as showing the present rule upon this subject as I understand it. "There is a distinction between the statutes exclusively applicable to moneyed corporations, and the general laws of the State, written and unwritten, applicable to all corporations. It may well be that the determination that these associations are corporations, may necessarily subject them to such general statutes as are applicable to all corporations, as they undoubtedly are to the rules of the common law in respect to corporations in general; but from these concessions it by no means follows, that the statutes exclusively applicable to a particular class of corporations must be applicable to these associations, in opposition to the intent of the Legislature."

In *The International Bank vs. Bradley* (19 N. Y. Rep. 245-255), it was held that the banking associations were not within section 33 of the act of 1839, the Safety-fund Act.

Thus it appears that these banking associations, under the general act, are corporations, or of the nature of corporations; that they are not subject to the particular provisions of the Revised Statutes as to moneyed corporations, contained in Title II.; and that they are subject to the general act as to proceedings in equity against corporations.

[D] *Act of 1849.*—By the constitution of 1846 various provisions were adopted for forming corporations under general laws, defining corporations, providing for the liability of stockholders in banking companies, and otherwise. (Article VIII.)

Under this provision an act was passed on the 5th of April, 1849 (Sess. Laws, Ch. 226), entitled “an act to enforce the responsibilities of stockholders in certain banking corporations and associations, as prescribed by the constitution, and to provide for the prompt payment of demands against such corporations and associations.”

The 1st section of the act provides for the liability of stockholders for debts contracted by the corporation or association for banking purposes, after the 1st of January, 1850.

The 6th section provides for declaring the corporation insolvent, by order of a Justice of the Supreme Court, after execution returned unsatisfied.

By the 7th section every creditor of such corporation or association, having a demand against it exceeding \$100, arising upon a debt or liability contracted after the 1st of January next (1850), the payment of which shall have been refused, may at any time after ten days from such refusal, apply to a Justice of the Supreme Court for an order declaring such corporation or association insolvent, and for an injunction as thereafter provided. If, in the opinion of such judge, upon the facts presented, it be expedient in order to prevent fraud or injustice, he may grant an order for a temporary injunction restraining such corporation or association and its officers from paying out, or in any way transferring or delivering to any person, any money or assets of such corporation or association, or incurring any debt or obligation until such order be vacated or modified.

By section 8, upon a hearing of the parties on such short notice as the judge shall appoint, he shall determine whether such corporation or association be clearly solvent or otherwise; and may require the production of books, &c. If he determine that such corporation or association is clearly solvent, he shall, notwithstanding, continue the order for a temporary injunction, if one has been granted, until the demand of the applicant be fully paid, with his costs, unless it shall appear, by affidavit or otherwise, that such corporation or association have a good defence on the merits to such demand.

And, by section 9, if the judge determine that such corporation or association is not clearly solvent, he shall make an order declaring the same insolvent, and shall, also, by order restrain such corporation or association and its officers from exercising any of its corporate rights, or any rights or privileges granted to it by law, and from collecting or receiving any debts or demands, and from paying out or in any way transferring or delivering to any person any of its property, money, or effects, until such order be vacated ; and he shall immediately appoint a receiver of the property of such corporation or association.

In *Livingston vs. The Bank of New York* (26 Barbour, 304), Justice Roosevelt considered that the Act of 1849, being subsequent in time, and especially directed to the case of banks of issue, and covering precisely the same ground, superseded the older enactments. A bill-holder had demanded payment in specie during the general suspension. This afforded no proof of insolvency. Within the meaning of the act a bank was solvent, and, consequently, not to be proceeded against, if it has property more than sufficient to satisfy all demands.

In the matter of *The Empire City Bank* (18 N. Y. Rep. 199), this statute was examined. A judge had, by order, temporarily suspended the action of the bank, and enjoined its disposing of its property or incurring any debt. Subsequently an order was made, declaring the bank insolvent, and appointing *The United States Trust Company* receiver. The receiver's report was referred by order at Special Term, with directions to apportion the debts among the stockholders. Finally, a judgment of apportionment was entered, from which an appeal was taken to the General Term, on the ground of want of jurisdiction, it not appearing that the bank ever issued bank notes to circulate as money.

The Court of Appeals found sufficient evidence of this fact in the papers. The Supreme Court, at Special Term, had general jurisdiction to charge stockholders of banks of issue with the unpaid debts. The question of jurisdiction in the preliminary point could not be raised after judgment. It was held that the act was constitutional, for the general banking law of 1838 reserved to the Legislature the power to alter or repeal it. This bank was organized subsequently to the Constitution and the act of 1849. The act was not liable to the objection that it deprived stockholders of a trial by jury. The proceeding before a referee, where each

party could be heard, was due process of law, within the State constitution. Personal service is not required to constitute due process of law. The Legislature can provide for a notice by publication. A stockholder's liability is not limited to the amount paid in, or agreed to be paid in ; but he is, in addition, responsible in a sum equal to that amount.

Persons holding stock by hypothecation, and in whose names it is registered, are stockholders within the act, and liable for unsatisfied debts.

Second.—Municipal Corporations.

The next subject of inquiry is, in what cases will the acts of a municipal corporation be interfered with by injunction ?

A municipal corporation is defined to be one constituted for the government of a portion of the State. The chartered cities and boroughs form, in our country, a large class of this description.¹

The act of July 21, 1853 (Ch. 603) contains some provisions as to the power of municipal corporations to borrow money, contract debts, and loan their credit. The last section makes it inapplicable to any corporation which, by any existing law, was authorized to borrow money, or issue evidences of debt.

There is a general act for the incorporation of villages passed in December, 1847 (Ch. 426), and amended in various subsequent statutes. See 5 Ed. of Statutes, vol. 2, p. 701.

The first point to be noticed relates to the parties who may apply, and the cases in which a court of equity will give relief by injunction to prevent wrongful, illegal, or fraudulent acts of a corporation or its officers.

The directors or managers of a corporation are trustees for the holders of the shares. Hence, the shareholders are entitled to relief in equity against an actual or threatened waste or misapplication of the corporate property. (17 N. Y. Rep. 592.)

It seems to be also settled, that a suit for that purpose must be brought in the name of the corporation, unless it appears that the directors refuse to prosecute, or are themselves the guilty parties answerable for the wrong. If they do thus refuse, or are thus answerable, the shareholders may sue in their own names ; but in such case, the corporation must be made a defendant, either solely, or jointly with the directors sought to be charged. (Ibid.)

¹ Bouvier's Dictionary, Title Corporations.

The authorities which sustain and illustrate these positions, are stated *ante* p. 264.

Illegal taxes or assessments imposed by a municipal corporation, may be reviewed on *certiorari*, and set aside.

But the general rule is, that a court of equity will not entertain an action by a party aggrieved, for relief in such cases.

An action was brought in the Superior Court of Buffalo, demanding judgment, that an assessment, made by the Common Council in the regular mode, upon the plaintiff's land, be declared void, and that the defendants be perpetually enjoined from collecting the same. Various grounds of illegality were alleged, and the case arose on demurrer.

It was declared: That a legal assessment was a lien on the land; an illegal one, as one made without authority, was no lien. Even if it is to be regarded as an apparent lien, it did not follow that was such a cloud upon the title, as entitled the plaintiff to relief in equity. It was still the law, that a party who brings an equitable action must sustain it upon some equitable ground; and if his cause of action is of a legal, and not an equitable nature, he must bring a legal action, or pursue a legal remedy. If the matter is *prima facie* one of legal cognizance, the party, to entitle himself to equitable relief, must show that a perfect remedy cannot be obtained at law. (Heywood *vs.* The City of Buffalo, 14 N. Y. Rep. 534.)

Justice Johnson said: "The general rule was subject to three exceptions: 1st, where the proceeding in the subordinate tribunal will necessarily lead to a multiplicity of actions; 2d, where they lead, in their execution, to the commission of irreparable injury to the freehold; and 3d, where the claim of the adverse party to the land is valid upon the face of the instrument, or the proceedings sought to be set aside, and extrinsic facts are necessary to be proved, in order to establish the validity or illegality."

These propositions passed without disapprobation from any member of the Court of Appeals. Mr. Justice Denio delivered the only other opinion, and he concurred with the court below as the ground of decision, that the illegality of the tax sufficiently appeared on the face of the proceedings.

The court has refused injunctions for relief from illegal taxes or assessments in Blake *vs.* The City of Brooklyn (20 Barbour,

301), *Bouton vs. The City of Brooklyn* (15 Barbour, 375), *Betts vs. The City of Williamsburgh*, (15 Barbour, 255), *Wilson vs. The Mayor of New York* (1 Abbott, 3), in which the subject is fully examined. *The New York Life Ins. Co. vs. The Board of Supervisors* (4 Duer's Rep. 192).

In the *Mutual Benefit Life Ins. Co. vs. The Board of Supervisors* (20 Howard's Pr. Rep. 415), the complaint sought to restrain the defendants from collecting a tax alleged to have been illegally imposed, because the plaintiffs were a foreign corporation, and had no place of business in the State. A demurrer was sustained.

In *Thompson vs. The Commissioners of the Land Fund* (2 Abbott, 248), a tax payer and inhabitant had loaned the State a million and a quarter of dollars, under the act of the 19th of February, 1855. He applied for an injunction to prevent the completion of another loan, under another act, on the ground of its being unconstitutional, and would injure his security as a lender. The application was denied.

Two of the exceptions to the rule, that the court will not grant an injunction to restrain the illegal imposition or collection of a tax, viz., the prevention of a multiplicity of actions, and where proceedings affecting real estate, may occasion irreparable mischief to the freehold, are declared to be such exceptions by Justice Nelson, in *The Mayor of Brooklyn vs. Meserole* (26 Wendell, 132).

The case of *The New Haven Railroad Co. vs. Schuyler*, is of importance upon the subject of the prevention of a multiplicity of actions, affording grounds for the interference of a court of equity, even where the matter of the action is of a legal nature. The action was brought in the Supreme Court by the company against 324 defendants, for settling the claims which arose out of the frauds of the defendant Robert Schuyler. See the case stated *post*, head "Cancellation of instruments."

There are several strong cases establishing the proposition that a court cannot interfere by injunction, to restrict the exercise by a municipal corporation of any of its legislative powers, or of the exercise of any of its functions necessary or important for the due government of the body of which it has control.

In *Ketchum vs. The City of Buffalo, &c.* (14 N. Y. Rep. 356), the action was to restrain the city from completing the purchase of lots for a market, and cancelling the bonds of the corporation given in payment, and enjoining the defendants from levying a tax to pay the bonds. The complaint was dismissed, and the judgment affirmed in the Court of Appeals on the merits. The court declined passing upon the plaintiff's right to support the action. But Mr. Justice Wright was clear he could not do so, and his argument is full and powerful.

In *Doolittle vs. The Supervisors of Broome County* (18 N. Y. Rep. 155), the point decided was, that the act of a Board of Supervisors in erecting a new town could not be declared void, and the organization restrained, in a suit by residents and freeholders of such proposed new town, they having no other interest than one common to all the freeholders of such town. A private person cannot question such an act, unless it involve some peculiar damage to his individual interests. The authorities are examined with great minuteness by Justice Denio, and he states the rule thus: "No private person or number of persons can assume to be the champions of the community, and on its behalf challenge the public officers to meet them in the courts of justice, to defend their official acts."

I should have supposed that the principle of this case was decisive of the whole matter, but for the observation at the close of the opinion, that it may be that where a town is governed in its local affairs by means of a corporation, the citizens stand in a different relation to the local government to that which they occupy in other cases.

However, in the case of *Roosevelt vs. Draper* (23 N. Y. Rep. 318, 16 Howard, 167), the Court of Appeals, through the same learned judge, adverted to this point as left open in *Doolittle vs. The Supervisors, &c.* He said: "The reasoning by which the conclusion was reached, as well as the examination of adjudged cases, applied generally to the administrative acts of municipal corporations equally well with the case in hand. Still, as it had been suggested that different considerations might apply, where the act complained of was that of a corporation of a city, we withheld the expression of any opinion upon the alleged distinction between the cases. But having now heard this aspect of

the question discussed, we are prepared to say, that no such distinction exists."

It was decided in the same case, that a holder of the public stock of a corporation could not sustain a suit to avoid an alienation of its property, upon which he had no specific or general lien, and which is not shown to be essential to the security of the corporate creditors.

The exception to the rule, as to the incapacity of a citizen thus restraining the proceedings of a corporation, is thus stated by Chief Justice Denio, in *Davis vs. The Mayor, &c.* (14 N. Y. Rep. 506): "It is well settled that where such an offence (as a nuisance) occasions, or is likely to occasion, a special injury to an individual, which cannot well be compensated in damages, equity will entertain jurisdiction of the case at his suit, and also that the Attorney-General, in all cases where a preventive remedy is called for by the circumstances, or the State in its own name, may apply for an injunction against the perpetrator of the wrong."

The action had been commenced by persons alleging themselves to be taxpayers, residents of the city of New York, and owners of real property therein, and also owners of lots situated on Broadway, through which the projected railroad was to run. The allegation of ownership of lots on Broadway was put in issue, and not proven; and the judge found that the railroad would not be specially injurious to the plaintiffs. The court below had allowed the complaint to be amended by introducing the Attorney-General. The Court of Appeals held that this could not be done.

In *Whitney vs. The Mayor, &c.*, of New York, and others (28 Barbour's Rep. 233), it was held, at Special Term, that the court will not interfere by injunction to restrain a municipal corporation from passing a resolution or ordinance giving permission to a railroad company to run steam-engines in particular streets or avenues of the city; unless in a case where it appears that the mere formal passage of such resolution would instantly, without any action or attempt to enforce any right under it, effect an irremediable private injury; a case the learned judge could scarcely conceive to exist.

Milhan vs. Sharp, concerning the Broadway Railroad, was before the Supreme Court finally in October, 1858. (28 Barbour,

228.) The judge, at Special Term, had found that the plaintiffs were owners and occupants of buildings and lots fronting on the streets, and that the establishment of a railroad would be especially injurious to their property. Upon this finding, the defendants were perpetually enjoined from entering upon Broadway, for the purpose of establishing a railroad therein.

The General Term affirmed such judgment.

In the case of *The People vs. The Mayor, &c.* (19 Howard's Pr. Rep. 155), Mr. Justice Strong says: "It is apparent from the opinion of Justice Ingraham, on the decision of the motion for an injunction, that he intended to decide that the Attorney-General has authority to bring an action in the name of the people, to restrain a municipal corporation from exercising authority in making a contract, or performing similar acts, not possessed by it under its charter, or by law."

The action was to restrain the defendants from making or carrying into effect a contract for the construction of the gate houses of the Croton reservoir.

Justice Ingraham and Justice Strong agreed, that passing a resolution was a legislative act, and that the defendants could not be enjoined from any legislation they might deem proper. But it might be granted to restrain such corporation from carrying into effect a resolution passed by them.

In the case of *The People, and Flagg, Comptroller, &c., vs. Lowber* (28 Barbour, 65), Mr. Justice Ingraham said, that if an action in the name of the people could be maintained at all, it could only be to prevent the commission of fraudulent acts in regard to corporate property, and the doing of acts not authorized by their charter. "However unwise, improvident, extravagant, or unnecessary may be a purchase which a municipal corporation may intend to make, neither the Attorney-General nor any taxpayer has, in my judgment, any right to interfere by action and by injunction."

Third.—Railroad corporations.

There are some rules and decisions peculiarly pertinent to railroad corporations. And I first notice what has been said in the Court of Appeals upon the right of the city of New York to authorize a railroad in a street.

In *Davis vs. The Mayor, &c.*, of New York (14 N. Y. Rep. 506,

1856), Ch. Justice Denio held two propositions bearing upon this question. *First*, If authority to establish the railroad had been granted by the Legislature, mediately or immediately, the road could not have been a nuisance. *Next*, The corporation of New York had assumed to establish a railroad, running wholly on a city street, without any other legislative authority than the general power to regulate, amend, and alter the streets, roads, and alleys of the city. The establishment of such a road was not within the jurisdiction conferred upon the corporation. There was a marked distinction between the use of land given to the public to be used as a highway, and its use as a railroad.

Mr. Justice Comstock said: "He was not able to assent to the views of the Chief Judge in regard to the power of the Common Council over the subject embraced in the resolution. I am confidently of opinion that the municipal government of New York may construct, and by mere license authorize others to construct, an iron track in Broadway, adapted to the vehicles of the kind used on railroads, and that licenses may be granted to the owners of such vehicles, as other carriages are now licensed." No other Judge expressed an opinion on this question. The case was decided on another point.

In the second edition of the work of the author on *The Law of the Corporation as proprietors*, every case upon this subject is examined. I refer to this work under the head of *Title to Streets*.

The case of *The People vs. The Albany and Vermont Railroad* (19 Howard Pr. Rep. 523) involved an important principle. The action was by the people of the State, through their Attorney-General, to restrain the defendants from removing the rails on some twenty miles of their railroad. An injunction to this effect was sustained. After a railroad is completed and used, the company have no right, without imperious necessity, to abandon any portion of it. The public have rights in it which should be protected.

The action had for its object the compelling the company to repair and operate the road. The learned judge thought such an action could be supported. (*Rex vs. The Severn and Wye Railroad Company*, 2 Barn. & Ald. 646.) The injunction against removing that portion of the rails not necessary to repair and refit the road for operation, was sustained.

How far railroad companies may be compelled to complete and use a railway commenced, but not perfected, will be found stated in Redfield on Railways, Tit. Mandamus, p. 453, and cases.

In *Williams vs. The New York Central R. R. Co.* (16 N. Y. Rep. 97), the point decided was this: That where land had been gratuitously dedicated by the owner to the use of the public for a highway, it could not be taken by a railroad company for the use of the road, without consent, or a compensation.

Fourth.—Religious corporations.

It is first to be noticed as a guiding principle upon this subject, that a corporate body, formed pursuant to the third section of the act of 1813, chapter 60, has no denominational character, and none can be engrafted on it. This section is the general one for incorporating all religious bodies, other than those of the Episcopal and Dutch-Reformed Churches, which are provided for in previous sections of the same act.

The legal character of the corporation is not affected by the existence or non-existence of ecclesiastical connection, doctrine, rites, or mode of government of a church formed by the corporators. Persons otherwise qualified do not lose their right to vote at elections, by reason of their having renounced the doctrine and ecclesiastical government possessed by the religious body in whose worship and services the corporate property has always been employed. The title of trustees to office is not impaired by their aberration from the doctrines or government so held. (*Pettis vs. Trustees Parish Bellport*, Court of Appeals, 1860.)

In *Cooper vs. The Trustees of the First Presbyterian Church of Sandy Hill* (32 Barbour, 222), the application was by six pew-holders in a church to restrain the trustees from removing their pews, and erecting slips or other structures in their place. The church was regularly organized under the act of 1813. The title to the ground and edifice was to be deemed in the corporation, on a question between it and pew-holders.

The court repeated the rule laid down in *Wheaton vs. Gates* (18 N. Y. Rep. 404), that the interest of pew-holders did not constitute them owners or part owners of the lot; such interest consisted in the right to occupy their respective pews, as part of the auditory, upon occasions of public worship. From the very subject matter of the conveyance, the pew-owner must be presumed

to have taken it with all the conditions incident to such property. The trustees can, for useful purposes, take down and remove the pews of the pew-holders.

The distinction taken in several cases in Massachusetts as to meeting-houses, was recognized and applied to pews. If alterations are made from necessity, no compensation is due; but if from convenience, or expediency, a recompense must be made. An action for damages may be sustained, but not trespass.

In *Hartt vs. Harvey* (32 Barbour's Rep. 55), it was decided, that an injunction would not be allowed in behalf of the legally elected trustees of a religious society, to restrain individuals having no right to the office, from assuming to act as such. A *quo warranto* was the proper remedy. There is no jurisdiction in a court of equity to determine the right to an office, unless, from particular considerations, a court of law cannot furnish adequate relief.

The Revised Statutes (5th Ed. 600, § 5) gave the Supreme Court power to inquire into the validity of all elections, except those of religious corporations. The remedy in case of the latter is *quo warranto*.

In *Bowen vs. The Trustees of the Irish Presbyterian Church* (6 Bosworth, 245), a suit was instituted in the Superior Court to enforce a contract of sale made by the trustees of the church, with the assent of a judge of the Supreme Court. Some of the members of the church then commenced an action in the Supreme Court against the trustees alone, and enjoined them from conveying the property, making various allegations of the invalidity of the contract, inadequacy of price, &c. The present plaintiffs were not made parties. While this action was pending, a judgment awarding an injunction was obtained in the Supreme Court. An attempt was made to introduce such judgment by supplemental answer, which was denied. The judge below admitted that the authority of the Supreme Court to revoke the permission it has granted, so long as the contract was not consummated, might be clear. The court is the trustee of the members at large, to protect their interests, and may recall an order made from surprise, or obtained by fraud.

It could not be said, that the existence of that suit would be a plea in bar to the present, for the plaintiffs are not parties to it.

The General Term held, that such judgment could not be regarded as an adjudication of the rights of the present plaintiffs, under their contract, and the order of the Supreme Court. It did not purport to revoke and set aside such order, but only to enjoin the defendants from acting under it. It did not determine that the contract was not a lawful contract, made by proper authority, even admitting that a decision of its illegality could be made without bringing in the plaintiffs as parties.

It was also decided in this case that a religious corporation has power to make an executory contract to sell real estate, subject to the action of the Supreme Court. If an order of that court authorizing such sale be obtained, the contract will be valid and binding on the corporation, without further ratification by them. The fee is vested in the corporation, and the only restriction upon the power of selling and conveying, is the indispensable condition of obtaining an order of the Supreme Court sanctioning it.

In *Wyatt vs. Benson* (4 Abbotts' Rep. 182) an injunction was applied for by the plaintiff and twenty-six other members of the First Methodist Episcopal Church, on behalf of themselves and other members of the congregation, against Benson and eight others, claiming to be trustees. Another object was to restrain further proceedings to effect a sale of the church property in John street.

The title to real estate was vested in the corporation, which was composed of the members of the congregation entitled to vote for trustees. The trustees were agents of the corporation, not the body itself. (*Robertson vs. Bullions*, 1 Kernan, 243.) The action of the trustees might be taken as presumptively that of the body in the first instance.

When the order is yet *in fieri*, not having been executed, and no rights having been acquired under it, it is still under the control of the court, and the court may revoke its consent to the rule. No contract had been made, it seems, with any one.

The court revoked its assent, because it was apparent that the measure was in opposition to the views of a large majority of the corporators.

The only ground on which the court can exercise jurisdiction to restrain a bishop from pronouncing judgment upon a

clergyman, pursuant to the sentence of an ecclesiastical tribunal, is, that the threatened action may affect some civil right of the plaintiff, for the protection of which he has a proper recourse to the civil courts, viz., exemption from taxation, and the performance of certain civil duties.

Even if this is a sufficient ground for interfering, the only cognizance which it will take of the case is, to inquire whether there is a want of jurisdiction in the defendant to do the act which is sought to be restrained.

The court will not review the exercise of any discretion on the part of the bishop, nor inquire whether his judgment, or that of the inferior ecclesiastical tribunal, is justified by the facts of the case. (*Walker vs. Wainwright*, 16 Barbour, 486.)

In *Youngs vs. Ransom* (31 Barbour, 49) an injunction had been issued restraining the defendant from acting as rector of a Protestant Episcopal church or interfering with the use of the building. The injunction being dissolved; an appeal was taken. It was ruled—

That the section which prescribed that a minister's salary should be fixed by a vote of the congregation, did not apply to Episcopal churches. (*Hambert vs. St. Stephen's Church*, 1 Edw. Ch. Rep. 308.)

The induction, as known in the English law, or "institution," referred to in the canons of this Church, is not essential to give to a rector his office and rights.

When a minister is called to and settled in the charge of an Episcopal parish, unless there is something distinctly expressed in the call and settlement, he cannot be dismissed without his consent, except by ecclesiastical authority.

A court of equity could not interfere, and eject by injunction a clergyman from possession of the church and preaching, when rightfully placed there, when there is no other person claiming the office.

The case of *Humbert vs. St. Stephen's Church* (1 Edwards, 308) deserves great attention upon this subject. It appears to me to be an exceedingly well-reasoned and well-decided case.

Fifth.—Foreign Corporations.

In the *Mutual Benefit Life Insurance Company vs. The Board of Supervisors* (20 Howard's Pr. Rep. 416), the action was to re-

strain the defendants from collecting a tax alleged to have been illegally imposed upon the plaintiffs, upon the ground that they were a foreign corporation, and had no place of business in the State. *Heywood vs. City of Buffalo* (14 N. Y. Rep. 534) was referred to, and the motion was denied. There was ample remedy by trespass for what had been seized.

Before a foreign corporation can be restrained from issuing its bonds, or executing a mortgage on its property, it must appear that they will obstruct or defeat rights which can be enforced.

Thus, in *Rogers vs. Michigan S. & N. Indiana R. R. Co.* (28 Barbour, 540) it was held that where a party had an attachment, judgment, and execution against a foreign corporation, under which he could not reach property, because it was out of the jurisdiction of the court, the court would not interfere by injunction, to prevent the execution of a mortgage by such company, upon the said property. If the judgment, execution, and attachment were not liens on the property proposed to be mortgaged, the plaintiff has no right or preference over other creditors of the corporation, either as a judgment or attaching creditor, or upon the ground of the insolvency of the company.

And it was also held that an injunction would not be issued to restrain such a corporation from transferring, beyond the jurisdiction of the court, bonds, stocks, and other equitable assets, when the plaintiff has a complete remedy at law, under a judgment, execution, and attachment.

3. Public officers.—The court will not interfere pending a litigation as to the title to an office, to protect the fund arising from its emoluments, in favor of a party apparently entitled to the office, against an insolvent intruder, exercising the powers and receiving the fees for the time being.

In *Tappan vs. Gray* (9 Paige, 507), a flour inspector was illegally appointed by the Governor, during the recess of the Senate, and was in the actual discharge of the duties of the office. The former inspector claimed the right to hold over, until a legal appointment was made. An injunction and receiver were refused.

This case was affirmed in the Court of Errors, on the point of want of jurisdiction; but no opinion was expressed by the court as to the legality of the appointment.

In *The People ex rel. Wood vs. Draper* (4 Abbotts' Rep. 333), this doctrine was recognized and applied. The action was one in

the nature of a *quo warranto*, to test the validity of the act of April 8, 1857, appointing Police Commissioners. A preliminary injunction had been granted, restraining the defendants from exercising any of the duties of the office as functions of Police Commissioners, until further order. The injunction was dissolved.

The *quo warranto* was now classed with civil remedies; and public officers might be restrained from performing acts under color of office not warranted by law; but it could not be allowed to restrain those who were in the actual exercise of their functions, from performing them.

When a case can be brought within the principle of a bill of interpleader, a municipal corporation bound to pay the salary of an officer, may have an injunction pending a *quo warranto* to try the title to office of two contestants.

This was decided in the case of the Mayor, &c., of New York *vs.* Flagg and others (6 Abbotts' Rep. 296). The Corporation of New York brought their action against the Comptroller, and Conover and Develin, each claiming title to the office of Street Commissioner, and obtained an injunction, restraining the Comptroller from paying the salaries, and the other defendants from bringing any suits pending a *quo warranto*, then pending to try the title.

By an act of 1851 (chapter 488) whenever any duty shall be devolved by law, upon any State officer or board of officers, no injunction shall be issued, to restrain such officer or board, or any person employed by them, or to prevent the execution of any such law, unless the same be granted by the Supreme Court, sitting in the District in which such Board shall be located, or such duty shall be required to be performed, at a General Term of said court.

Before hearing any application for an injunction in such cases, at least eight days' notice shall be served upon the officer, Board, or person against whom the application is made.

In case of the omission or neglect of the Attorney-General to appear and defend such officer, Board, or person, the Governor may employ counsel to perform such duty, and to institute any appeal, or other necessary proceeding, who shall have the control of such defence or proceeding; and the Governor may em-

ploy counsel to assist the Attorney-General in defending such officer, Board, person, or proceeding.

The Board of Metropolitan Police Commissioners are not State officers within this statute. They are officers of a locality or district, and may be restrained by the court in like manner, and to the like extent, as other local or county officers. (*The N. York and Harlaem R. R. Co. vs. The Mayor, &c., of New York*, 1 Hylton, 585.)

In *Leigh vs. Westervelt* (2 Duer's Rep. 618) it was held that the court had no jurisdiction to restrain Commissioners of Excise from granting licenses to sell intoxicating liquors. The defendants were intrusted by the Legislature with the power of granting such licenses to whomsoever they deemed proper. With this authority, a court cannot interfere. The remedy of citizens suffering from its being misused, was a prosecution for the penalty given by the act.

There is a series of English cases upon the subject of public officers, which contain some important principles.

In *Priddy vs. Rose* (3 Merivale, 86) it was ruled by Sir William Grant, that it was clear a suit might be maintained against a public officer; having in his hands money issued by Government, for the use of an individual. But where the Government had ordered the money to be withheld, the question was only between the Government and the individual, and the court had no jurisdiction.

In *Rankin vs. Huskisson* (4 Simons' Rep. 15), Commissioners of Woods, officers appointed under an act of Parliament, were restrained from building on part of the site of Carlton Palace, in violation of an agreement entered into by them, in relation to an adjoining part of the site.

And in *Ellis vs. Earl Gray* (6 Simons, 214), the Vice-Chancellor, after examining certain acts of Parliament, decided the case on this ground—that the bill did not seek to interfere with any public duty which the Lords of the Treasury have to discharge, or with any discretion which they have to exercise in their public capacity. But it sought to restrain them from doing a mere ministerial act, with the view of securing the money for the parties who might be decreed to be entitled to it.

4. Receivers.—*Suing.*—The cases in which Receivers may

have an injunction in actions brought by them, whether by express provision of statute, or on general principles, are stated under the head "Receivers," *post*, chapter V.

When sued.—And, in like manner, the rules when they are sued without permission, will be found in the same chapter.

It may in general be said, that when they are entitled to sue, they may have an injunction, whenever an individual suing in his own right, would be entitled to it.

5. Assignees, Trustees, Executors, &c.—In general, an injunction will be granted to restrain assignees and trustees from further interfering with an estate, which they have mismanaged, or put the funds in jeopardy by insolvency.

In *Elmendorf vs. Lansing* (4 Johns. Ch. Rep. 563) Chancellor Kent stated the rule to be, that an executor, or other trustee, who mismanages or puts the assets in jeopardy, by his insolvency either existing or impending, should be prevented from further interfering with the estate, and that the funds should be withdrawn from his hands. He cites the leading cases, especially *Middleton vs. Dodswell* (13 Vesey, 266).

In *Boyd vs. Murray* (3 Johns. Ch. Rep. 48), the learned Chancellor stated that such an injunction was not usually allowed, at least not without a receiver, which was the proper mode of relief. See *post*, title Receiver.

In *Bard vs. Colbron* (13 Price, 327) the bill was filed against assignees under an assignment to pay creditors, by the assignor. It charged various acts of neglect and misconduct, by the conversion of moneys collected, to his own use, and otherwise. An injunction was moved for before answer, and there were no allegations of insolvency. The injunction was denied.

6. Married Women.—In a series of cases it has been held, that where a husband needed the aid of a court of equity to obtain possession of his wife's property, such aid would only be given on condition of his making a proper settlement upon her.

In *Howard and wife vs. Moffatt* (2 Johns. Ch. Rep. 206), Chancellor Kent stated the rule to be, that where the aid of the court was requisite to enable the husband to take possession of the wife's property, he must make an equitable provision out of it for her support and that of her children. If the husband can get the property without the aid of a court of equity, he might do it.

In *Haviland vs. Myers* (6 Johns. Ch. Rep. 25), the Chancellor also declared, that this equity would prevail equally against the husband or his assignee, and against any sale made, or lien created by him, even for a valuable consideration, or in payment of a just debt. It was immaterial whether the suit in protection of that equity be instituted by the wife, or by any other person on her behalf. It might be instituted by the wife against a creditor at law to restrain him from touching the property, and the equity might be extended to the whole of the estate.

And in *Van Epps vs. Van Deusen* (4 Paige's Rep. 14), Chancellor Walworth held, that upon a bill filed by the wife, the court would restrain the husband or his assignee from proceeding to possess himself of her property in action, and would compel a suitable provision for her out of it.

The statutes of the State of New York of 1848 and 1849, have, to a great extent, superseded these rules. The married woman's rights to all property acquired under those statutes is absolute, and the husband has no title at law to it.

In *Vermilyea vs. Vermilyea* (14 Howard, 470), the action was for a separation from bed and board, and for support. It was sworn that the defendant was about selling his property, and removing with the proceeds to Kansas; and an injunction was sustained restraining such removal or disposition of his property, until after trial and judgment.

Rose vs. Rose (11 Paige, 166) was cited, in which it was conceded that a plaintiff wife was entitled to such an injunction to prevent the property from being squandered.

It was also held that it was no objection to the allowance of a temporary injunction, that the relief to be granted would not be a perpetual injunction of the same character.

7. Attorneys, solicitors, and counsel.—The relation of attorney and client is of so confidential a character as to have induced a court of equity to be very rigorous in restraining even an approach to the divulging of what has passed between them. It is unimportant whether the relation has been determined or continues. The production of documents of the client, obtained in consequence of the relation, is governed by the same rules. But there must be at least a controversy anticipated which induced the communications, to call for the application of the rule.

“The first point decided upon this subject was, that communications between solicitor and client pending litigation, and with reference to such litigation, were privileged. Upon this there is not at this day any question. The next contest was upon communications made before litigation, but in contemplation of, and with reference to litigation which was expected, and afterwards arose; and it was held that the privilege extended to these cases also. A third question then arose, with regard to communications after the dispute between the parties, followed by litigation, but not in contemplation of, or with reference to that litigation; and these communications were also protected. *Bolton vs. Corporation of Liverpool* (3 Simons, 467, and 1 Mylne & Keen, 88); *Hughes vs. Biddulph* (4 Russell, 190); *Vent vs. Pacy* (4 Russell, 193); *Claggett vs. Phillips* (2 Younge & Collyer, 82).

A fourth point which appears to have called for decision was the title of a defendant to protect from discovery in the suit of one party, cases or statements of facts made on his behalf by or for his solicitor or legal adviser, on the subject-matter in question after litigation commenced, or in contemplation of litigation, on the same subject, with other persons, with the view of asserting the same right. This was the case of *Coombe vs. The Corporation of London* (1 Younge & Collyer, 631). The question in that suit was the right of the corporation to certain metage duties, and the answer stated that other persons had disputed the right of the corporation to metage, and that they had in their possession cases which had been prepared with a view to the assertion of their rights against such other parties, in contemplation of litigation, or after it had actually commenced. Sir J. L. Knight Bruce held that those cases relating to the same question, but having reference to disputes with other persons, were within the privilege; and I perfectly concur with that decision.” *Per* Sir J. Wigram, V. C., in *Lord Walsingham vs. Goodriche* (3 Hare, 122.) See *Woods vs. Woods* (4 Hare, 83).

So Lord Lyndhurst, in *Herring vs. Cloberry* (1 Phillips, 91), says: “That where an attorney is employed by a client, professionally, to transact professional business, all the communications that pass between the attorney and the client in the cause, and for the purpose of that business, are privileged communications, and the privilege is that of the client, not of the attorney.”

The fact that the relation has ceased, by discharge of the attorney, or his abandonment of the suit, or by the termination of the cause or business, makes no difference.

In *Wilson vs. Rastall* (4 T. R. 759), Mr. Justice Buller said: "It is not sufficient to say, the cause is at an end; the mouth of the attorney is shut for ever."

And in *Biggs vs. Head* (1 Sausse & Sculley's Ca. in Ch. 335-352, Irish), the Master of the Rolls observed: "If it were to be held that a client could not discharge his solicitor pending a suit, or after the termination of any particular suit, without releasing him from the obligation of secrecy, it would seem that he must retain him, no matter how he may have misconducted himself, or how incompetent he may be to direct the suit."

Chancellor Walworth, in *The Bank of Utica vs. Mersebau* (3 Barbour's Ch. Rep. 533, 595), said, "that he considered the true principle to be, that where the attorney is professionally employed, any communication made to him by his client, with reference to the object or subject of such employment, is under the seal of professional confidence. Such appears to be now the settled rule in England, although it was at one time attempted to confine the privilege to communications made in the prosecution or defence of suits, which had been, or was about to be, commenced."

He refers, as to a well-considered opinion, to that of Mr. Justice Bronson, in *Coveny vs. Tannehill* (1 Hill's Rep. 33).

He also held that, where the privilege belonged to several clients, even a majority could not waive it, and warrant the attorney in giving evidence, contrary to the will of the others.

The Chancellor notices, also, some exceptions to the general rule. Thus, if an attorney has prepared a deed for his client, and witnessed its execution, he may be compelled not only to prove the execution of such deed, but also to testify whether it was antedated; whether it was in the same form at the execution in which it now appears, or has been altered; and whether it was actually delivered at the time of its subscription.

Again, it was settled that the privilege did not exist where the communications related to the commission of a crime, or any offence *malum in se*. The learned Chancellor thought, that the principle of this exception should extend to any thing done in

violation of the law of the State; but found the authorities decisive to the contrary. Hence, an attorney, alleged to have been consulted in preparing a fraudulent assignment, was not permitted to testify. Numerous cases to this effect are cited by him.

The production of documents which have come to an attorney's hands, by reason of his relation to the client, falls within the same rules, as oral communications. Vice-Chancellor Sandford examined the subject very fully in the case of *March vs. Ludlum* (3 Sandf. Rep. 35), and went over the leading cases. *Holmes vs. Haddely*, cited by him, has been since reported in *Phillips' Reports*, vol. 1, p. 476. It was held that not merely the opinion of counsel, but letters written, or cases stated for the opinion of counsel, by a party or his solicitor, with a view to a suit then in contemplation, are privileged from production, not only in that suit, but in any subsequent litigation with third parties, respecting the same subject-matter, and involving the question to which such letters and cases relate.

V. *Restraint of legal proceedings.*

This subject is arranged as follows:

1. Observations on the effect of the Code.
2. Proceedings in courts of this State.
3. Other actions in the same court.
4. Proceedings in foreign courts.
5. Against or by receivers and other officers.
6. Statutory foreclosure.
7. Summary proceedings by a landlord under the statute of New York.
8. Cancellation of instruments.
9. Administration of assets.

1. Observations on the effect of the Code.—The class of injunctions to restrain proceedings at law, perhaps the most important subject of injunctions under the old system, is so reduced by the Code, as to leave very little under this distinctive title.

Every defence to an action of an equitable, as well as a legal character, may now be made. Take the three first chapters of Mr. Drewry's Treatise on Injunctions (being Part I.), and it will be found that almost the whole is superseded by this great change.

Thus, the heading of the first chapter is: "Of Injunctions to stay proceedings at law, where the legal title of the defendant in equity is founded originally on some inequitable transaction; or is against public policy; or where, though the legal title of the defendant in equity may not have been originally inequitable, it has been tainted with fraud, actual or constructive, by the subsequent conduct of the party claiming under it."

If we take the cases specified in the analysis at the head of that chapter, we will see that, with one exception, the rule of the Code supersedes an injunction.

That exception is, where a party is entitled to come for the cancellation of an instrument, as a cloud upon his title or interest. See *post* [8] tit. Cancellation of instruments. In such a case the party may have a temporary injunction, when he makes out a case which will, if established, entitle him to a judgment of surrender and cancelment.

There are some cases, however, even under the Code, where an injunction will be the appropriate remedy.

2. Proceedings in other courts of the State.—It is anomalous, and would be highly injurious to suitors and to courts, if the proceeding of one court of co-ordinate jurisdiction should be interfered with by an order of another. From these considerations, it was early declared in the Superior Court, that no court could rightfully enjoin a defendant from proceeding in a suit in another court before commenced, and which court had equal power to grant the relief sought by the complaint.

The rule thus declared was stated at a joint meeting of the judges of the Supreme, Superior, and Court of Common Pleas, and unanimously approved. (*Grant vs. Quick*, 5 Sandf. Superior Court Rep. 612.)

See, also, *Arndt vs. Williams* (16 Howard's Pr. Rep. 244); *Foot vs. Sprague* (12 *ibid.* 366).

In the cases arising out of the claims of Conover, as Street Commissioner, a conflict arose between the Supreme Court and

the Court of Common Pleas. It is sufficient for my purpose to refer to the decision of Justice Peabody in *Conover vs. The Mayor, &c.* (25 Barbour, 513). He quoted *Grant vs. Quick*, with full approbation, and laid down as a clear rule that the court having first possession of a case, with powers adequate to the administration of complete justice in the premises, should retain the jurisdiction, and confine the litigation to that form. The efforts of any party to divert the litigation to another court should be restrained by injunction. It was particularly proper to restrain such a proceeding taken by a party after an adverse decision on his claim, in the court to which he himself first resorted.

There are also, from the necessity of the particular case, some exceptions to the general rule.

Thus, in *The New York and New Haven R. R. Company vs. Schuyler and others* (8 Abbotts' Rep. 239), the action was for the ascertainment and cancellation of certain spurious certificates of stock, issued through the fraud of Robert Schuyler, the transfer agent, and the complaint made over two hundred persons parties. Some actions had been commenced in other courts by holders of such stock.

It was held that an injunction could be issued in such general suit to restrain the proceedings in actions in other courts. From the necessity of the case, either court could enjoin the proceeding. It was proper in the suit in which all were parties. Any other rule would enable one defendant to defeat the whole proceeding.

In *McCarthy vs. Peake* (9 Abbott, 164), the rule was stated and acted upon that, if two actions between the same parties and upon the same subject matter are brought in two different courts, that which first acquires jurisdiction should dispose of the case. The court which was not the first to acquire jurisdiction, should, on motion, stay the proceedings before it.

It was, however, considered, in *Chappell vs. Potter* (11 Howard, 365), that the mode of restraining proceedings in a pending action was matter of practice merely, and that an injunction might, in some instances, be the most proper course. The plaintiff there had pledged various notes as collateral for debt, and had been sued (with the makers) as indorser upon them, and judgments recovered. He afterwards brought his action for a transfer of certain stock, also pledged, and to restrain the enforcement of

the judgments, on the allegation that the sum due had been tendered and demand of surrender made. He was held entitled to an injunction, giving the usual security. He might have the benefit of the judgments against the principal debtors on the notes.

So, in *Van Wagenen vs. Lafarge and Lahrens* (13 Howard's Rep. 16), a mortgagee, after obtaining a judgment of foreclosure and sale, made an agreement with the mortgagor, by which the premises were conveyed in trust to sell, in a manner prescribed, and to apply the proceeds to the judgment. He then attempted to execute the judgment.

An action was brought against him, and an injunction sustained, prohibiting the enforcement of the judgments; leaving the parties to the rights and course as regulated by the deed.

Here effectual relief as to the mortgagor might have been obtained by an order in the cause. If the action was also to enforce a sale according to the trust, a new party was, of course, necessary.

3. Actions or proceedings in the same court.—When a case exists of two suits for the same purpose in the same court of competent jurisdiction, the course is to move for a stay in one or the other. (*Diederich vs. Haysradt*, 4 Howard's Pr. Rep. 350.)

In *The Auburn City Bank vs. Leonard*, and *Leonard vs. The Auburn City Bank* (20 Howard's Pr. Rep. 193), it was ruled that, where a suit was instituted in a court, and a cross action commenced in the same court to obtain affirmative relief, a stay might be obtained by order when the circumstances justified it; an injunction was not necessary or proper.

But a stay ought not to be granted until both actions are at issue, and it shall appear that both causes of action may be tried on their merits in either suit. The court may then, in its discretion, suspend proceedings in one, until the trial of that which involves the whole merits. No order should be made in either action, until they are in such a condition that the court can see that the merits of both can be fully tried in the other, and that a stay will not prejudice or impair the rights or remedies of the party stayed. (*Fuller vs. Read*, 15 Howard's Pr. Rep. 236; 6 Duer, 697.)

The Marine Court has no power to open or vacate its own

judgment, except by appeal to the General Term, unless when obtained by default. And the 5th section of the act of 1859, giving the Comptroller power to apply to the court to open judgments, does not extend to the Marine Court. But by filing a transcript in the office of Clerk of the Common Pleas, it becomes a judgment of the latter court. Nor can the Common Pleas open or vacate such a judgment. The only course, therefore, when a case is made of fraud or collusion in obtaining the judgment, or other grounds exist for setting it aside, is to enjoin its enforcement, without prejudice to the parties' right to sue upon it in a Court of Record. In such action the defendants could apply for affirmative relief against the judgment. (*Martin vs. The Mayor, &c., of New York*, 20 Howard, 86).

4. Actions in foreign courts. — It was held, in the case of *Field vs. Holbrook* (Special Term, Superior Court, Oct., 1856, 3 Abbotts' Rep. 377), that a court of this State, of equitable jurisdiction, had power to enjoin a party to an action pending in it, from suing the adverse party upon the same subject-matter, in a foreign tribunal. The plaintiff and defendant resided in New York. The contract, though dated in St. Johns, was to be performed in New York. It related to stock of a company, as much a company of New York, as of Newfoundland or London.

The judge said: "It is obvious that the whole litigation can be, properly and justly to all parties, carried on in this court. If testimony is needed from abroad, the usual course is open.

"The earliest case generally cited on this subject, is *Lowe vs. Baker*, before Lord Clarendon in 1692. He refused an injunction to restrain a party from proceeding in a suit at Leghorn. The report is found in Freeman's Reports, 2; in 1 Chancery Cases, 67; and in Nelson's Reports, 103. In Hovenden's edition of Freeman, it is stated from the Register's Book that the Lord Chancellor had consulted with several of the judges. In Nelson's Reports it is stated, that all the barons were of a different opinion from the Lord Chancellor, and the Bar was dissatisfied with the decision.

"Without referring to the intermediate cases which bear but slightly upon the question, I proceed to notice those commencing in 1821, in which it has been fully considered.

"In *Harrison vs. Gurney* (2 Jac. & Walker, 562), a decree for

the execution of certain trusts was made in a creditor's suit, and a receiver appointed. Some of the estates were situated in Ireland. The trustees had subsequently filed a bill in Ireland for the same object. An order was made restraining their proceeding in that suit. The Lord Chancellor said they might call the receiver to an account, but in other respects the second bill was unnecessary.

"*Bushley vs. Munday and others* (5 Madd. R. 297), is a leading case. The bill was to set aside a bond given by the plaintiff to Munday as trustee for the others, in part satisfaction of money lost at play. A motion was made that an injunction before granted should be extended to prevent Cloves, the assignee of the bond and a defendant, from proceeding with a suit upon it in the Court of Sessions in Scotland. It was stated that the Scotch Court had jurisdiction of the suit first, which, from the case submitted to Mr. Cranstoun, appears to have been the fact, by about two months. The Vice-Chancellor observed that the object of the two suits was the same, but the court here could give a relief by cancelling the bond, which the court there could not do. It was more convenient, also, for this court to say whether by the law of England the bond could be recovered upon, and the plaintiff here could have the benefit of the admission of the assignor under oath in his answer. The injunction was granted.

"In *Beckford vs. Kemble*, 1822 (1 Sim. & St. 7), after a decree for a redemption in England, the defendants instituted a suit in Jamaica to foreclose the mortgage, and were restrained, upon certain terms. All the parties resided in England, but the lands were in Jamaica.

"*Lord Portarlington vs. Soulby*, came before Lord Brougham in 1834 (3 Myl. & Keene, 104). He adverted to *Lowe vs. Baker*, and thought the answer given to Lord Clarendon was a sound answer, viz., that the order affected the parties only. He noticed some later cases, especially *Campbell vs. Houlditch*, in 1820. He sustained an injunction restraining the defendants from proceeding with a suit in Ireland on a bill of exchange given, as alleged, for a gambling debt. I gather from the case that the transaction took place in England. The case of *Penn vs. Lord Baltimore*, and cases of that character, were also adverted to, as tending to the result he had arrived at. That leading authority was the

one on which *Ward vs. Arrendondo*, in our own court, proceeded.

“The late case of *The Carron Iron Co. vs. McClaren* (5 Clarke’s Cases, House of Lords, July, 1855), contains a full discussion of the subject. It arose upon an appeal from an order continuing an injunction. (16 Beav. 279, 289.)

“A suit in Chancery in England was instituted in March, 1852, to carry the trusts of a will into execution. In May, 1852, a decree for an account, &c., was made. The plaintiffs were a company located in Scotland, with agencies in England. The testator was one of their agents, and was alleged to be largely indebted to them. In October, 1852, the company commenced a suit in the Sessions in Scotland against the executors. They obtained an inhibition and arrestment. In December, 1852, an injunction to restrain proceedings in Scotland was continued (16 Beav. 279, 289), and from this an appeal was taken.

“The Lord Chancellor said: ‘When, pending a litigation here, in which complete relief may be had, a party to the suit institutes proceedings abroad, the court in general consider this as a vexatious harassing of the opposite party, and restrains the foreign proceedings.’ *Harrison vs. Gurney* (2 Jac. & W. 503) and *Reckford vs. Kemble* (1 Sim. & St. 7) are then cited, with the observation, that decrees had been first obtained in those cases. He proceeds: ‘Even if no decree had been obtained in this country, yet if a suit instituted abroad appears ill-calculated to answer the ends of justice, the court has restrained the foreign action, imposing terms considered reasonable to protect the party.’ (Citing *Bushley vs. Munday*, 5 Madd. 297.) But even when there is no question as to the foreign litigation being or not being necessary, or being or not likely to be as effectual as litigation in this country, still if a person within the jurisdiction of this court is instituting proceedings in a foreign court, contrary to equity and good conscience, the court will restrain the prosecution of such foreign suit, just as if it had been a suit in this country. But the court will not interfere if, from any cause, it appears likely to be more conducive to justice that the foreign proceedings should be left to take their course. Lord Eldon, in *Kennedy vs. Casselis* (3 Swanston, 313), and Lord Lyndhurst, in *Jones vs. Geddes* (1 Phillips, 724), acted on the same principle.

“‘These are instances in which this court has interfered, on principles of convenience, to prevent litigation, which it has considered to be either unnecessary, and therefore vexatious, or else ill-adapted to secure complete justice.’

“He then states the rule as equally clear, that the court had no right to interfere with a foreign creditor resident abroad, suing in the courts of his own country, even after a decree for administration of assets here; and proceeds to discuss and decide the point, that the Carron Iron Company were in fact residents of Scotland, within that rule; that the fact of their owning property in England and selling their articles chiefly there, and having agencies there established, was not enough, and the service on the agent was not sufficient. On this ground the injunction was dissolved.

“Lord St. Leonards, however, dissented as to this point, and of course gave his authority in substance to the other positions of the Lord Chancellor, as did also Lord Brougham. Lord St. Leonards enters into a very careful consideration of the authorities. He fully approves of *Bushley vs. Munday*.

“In *Mead vs. Merritt* (2 Paige R. 404), Chancellor Walworth stated, ‘That where a party was within the jurisdiction of the court, so that on a bill properly filed here, this court has jurisdiction of his person, although the subject-matter of the suit may be situated elsewhere, it may, by ordinary process of injunction, compel him to desist from commencing a suit at law, either in this State or in any foreign jurisdiction. The Court of Chancery in England has even gone so far as to restrain the defendant from proceeding in a suit previously commenced in a Court of Session in Scotland. But this court will not sustain an injunction bill to restrain a suit or proceeding previously commenced in a court of a sister State, or in the Federal courts.

“I think the present case is within the principle of the cases I have cited. The contract is to be executed here. The parties reside here. A suit is commenced in this court, effectual in its structure to determine the whole controversy, and the defendant threatens another suit, at a distance, and inevitably attended with vexation and embarrassment to the plaintiff and other parties.

“Order for the injunction accordingly.”

In *Cox vs. Mitchell* (7 Common Bench Rep. 55, N. S. 1859) the plaintiff, a merchant at Liverpool, commenced an action in

one of the Superior Courts of the United States, against the defendant, a merchant of South Carolina, for a breach of contract. While such suit was pending, he sued the defendant in the Court of Common Pleas in England, on the same cause of action, and held him to bail.

The court refused to stay proceedings in the case before it. There was no authority and no principle for such a course.

In *Williams vs. Williams* (31 Barbour, 364) it was declared to be the settled rule in this country, whatever it might be in England, that a court would not enjoin a defendant from prosecuting an action commenced and pending in another State, in which the same matters were involved. (*Burgess vs. Smith*, 2 Barbour's Ch. Rep. 276.) A plea of a suit pending for the same matter in a foreign State or country, is no bar to an action here.

5. Against or by receivers and other officers.—It has been settled practice, that no action could be brought against a receiver who is an officer of the court, without its permission.

In *Parker vs. Browning* (8 Paige, 589) the Chancellor declared, that where complaint is made against the officer of the court for misconduct, the court may either take to itself the cognizance of the complaint, or may permit an action to be brought for the alleged injury.

In *Van Rensselaer vs. Emery* (9 Howard, 135), where a receiver had been appointed, an injunction obtained against him in another suit was vacated. Justice Harris said, that the proper mode of restraining such an officer, when engaged in discharge of his official trust, is by application to the court for instructions, and not by making him party to an action and getting an injunction. (See *Hubbell vs. Dana*, 9 Howard, 424.)

In *De Groot vs. Jay* (9 Abbotts' Rep. 364) the rule was recognized and acted upon by the General Term of the Supreme Court. It was observed that such a rule was essential for the protection of receivers against oppressive and unnecessary litigation, and should be carefully maintained. It was a contempt of the court to sue a receiver without such permission. In most cases of claims against a receiver, or the fund or property in his hands, a remedy by special motion is adequate. Any person having such a claim may resort to this summary remedy. A motion to stay proceedings in an action thus commenced without leave, was granted.

So, it is the settled practice that a receiver cannot sue without permission given him by the court which appoints him.

In *Merritt vs. Lyon* (5 Paige, 125, in error, 16 Wendell, 410) the subject was fully examined, and the cases stated. The court will interfere to protect third persons against an abuse of power, attempted to be exercised by another, under pretence of authority derived from the court, as an officer thereof. The possession of a receiver or sequestrator is considered as the possession of the court by which he is appointed.

See *Wardle vs. Lloyd* (2 Molloy, 388); *Ex-parte Clarke* (1 Russell & Mylne, 563).

In *Smith vs. Woodruff* (6 Abbott, 65) a receiver had brought an action without obtaining leave from the court. Judgment was obtained against him with costs. A motion on his behalf to stay execution to collect them against him personally, was denied with costs. See, also, *Phelps vs. Cole* (3 Code Reporter, 157).

In *Winfield vs. Bacon* (24 Barbour, 154) Mr. Justice Birdseye stated the rule, that a receiver authorized to sue was bound to proceed, and could not be restrained by injunction out of another court, or by making him a party to a new action.

And such rule has been applied to other officers, such as commissioners to take testimony.

Upon a commission issued out of the Court of Chancery, for the examination of witnesses, the fees of the commissioners being disputed, they sued at law for the amount demanded. They were restrained by injunction from proceeding, and a reference ordered to the Master. They were officers of the court. (*Ambrose vs. Dunmow Union*, 8 Beavan's Rep. 43.)

To the same point are *Blundell vs. Gladstone* (9 Simons, 455), and *In the matter of Weaver* (2 Mylne & Craig, 441).

6. Statutory foreclosure.—Under some special circumstances a mortgagee will be enjoined from resorting to his legal right of a statutory foreclosure.

In *Davis vs. Briggs* (3 Howard's Pr. Rep. 65) a subsequent mortgagee had commenced a foreclosure by action, and had made a prior mortgagee a party, who had answered. The mortgagor answered, denying the rights of the plaintiff. The first mortgagee, in consequence of the delay, commenced a foreclosure by advertisement under the statute. Mr. Justice Barculo restrained

the first mortgagee from proceeding to sell, until the decision of the cause and further order.

In *Bedell vs. McClellan* and others (11 Howard's Pr. Rep. 172) the action was begun to foreclose a mortgage on the 21st of May, 1855; a notice of *lis pendens* was filed, and a summons and complaint delivered to the sheriff, and served on the 23d of May. The defendant Husted had a prior mortgage, covering one of the farms embraced in the plaintiff's mortgage. He had commenced proceedings to foreclose his mortgage under the statute, upon the 22d of May, 1855. A motion to restrain Husted's proceedings was denied.

7. Summary proceedings of a landlord.—By the statute (2 R. S. 512) a mode is provided for a summary recovery of possession by a landlord, against a tenant in default. By section 47 the Supreme Court is authorized to award a certiorari; but the proceedings on any such application shall not be stayed by such writ of certiorari, or any other writ or order of any court or officer.

Duigan vs. Hogan (1 Bosworth's Rep. 645) is a case which covers nearly every question upon this subject. It was considered that the whole scheme of the statute was this: Upon certain specified allegations, the landlord may require that the tenant be summarily removed. The tenant may interpose certain specified grounds of defence. The issues between them shall be tried by a jury. Upon a determination in favor of the landlord, he shall be put into possession. And neither by writ of certiorari, or by any other writ, or order of any court or officer, shall the proceedings be stayed.

Such proceedings can be reviewed in a manner prescribed. This was a complete scheme or system, which the Legislature thought wise and sufficient.

The 219th section of the Code was not inconsistent with the 47th section of the statute above stated, but the latter was in full force. By section 219, a party may have a temporary injunction, when, by existing law, he would be entitled, on making out his case, to a permanent one. The 47th section forbids the relief asked.

A temporary injunction can only be granted, where a perpetual one can be, if the case is made out. The question is, un-

der the 219th section, whether the plaintiff is entitled to the relief demanded, if he prove his case.

The defence which was the ground of the injunction suit, was either a valid defence before the magistrate, or not. If valid and rejected, the court above could correct it. If not valid there, the Legislature has prohibited its being used, to prevent recovery, though it may be available as the ground of a separate action.

The authorities, apparently conflicting on the subject, were referred to. (*Smith vs. Moffat*, 1 Barb. S. C. Rep. 65; *Cure vs. Crawford*, 5 Howard, 293; *Ballston vs. Seignett*, 2 Abbott, 121; *Hyatt vs. Burr*, 8 Howard, 168; *Capet vs. Parker*, 2 Sandf. S. Ct. Rep. 662.)

In the case of *Marks vs. Wilson* (Special Term, Superior Court, July, 1861) several points of moment were raised.

The complaint was for an injunction to restrain the defendant from executing a warrant granted by a justice of the Marine Court of the City of New York, to dispossess the plaintiff under the act "of Summary Proceedings to recover possession of Land," &c. (2 R. S. 512, vol. 3, 5th ed., p. 836, § 28). The warrant was for holding over after the expiration of the term without permission.

Hoffman, Justice: "The 47th section of the act provides that the Supreme Court may award a certiorari, for the purpose of examining any adjudication made on any application hereby authorized; but the proceedings on any such application shall not be stayed or suspended by such writ of certiorari, or any other writ or order of any court or officer.

"The case of *Dunigan vs. Hogan* (1 Bosw. R. 645) settles the law in this court, holding that the Code (§ 219) is not inconsistent with the 47th section of the Statute, and that it remains in force, and leaving probably no case whatever, except one of undue advantage, fraud, and surprise, to which the landlord is a party, in which an injunction can be granted. *Forrester vs. Wilson* (1 Duer R. 624) was of this character, and rests upon its own peculiar circumstances. See, also, *Hyatt vs. Burr* (8 How. R. 168).

"But, again, I am clear that the injunction ought not to issue upon any ground as to which the party could have relief in a fixed statutory method, adequate to the purpose.

"The method of redressing every error, defect, or irregularity

apparent on the record, is prescribed by the section 47, giving a certiorari. That writ has been sued out, and is now pending, although the stay of proceedings originally granted has been discharged. (*Marsellis vs. Bulger*, 19 How. R. 34.)

“An appeal also lies to the Common Pleas from an adjudication in such a proceeding. (1 Hylton R. 399 ; 3 R. S., 5th ed., p. 840, § 52.)

“Of the alleged errors in the proceeding, the certiorari will take up the defects in the affidavit.

“The 48th and 49th sections of the Statute provide for restitution of the possession, if the proceedings are reversed, and for damages sustained by reason of such proceedings. It is said that the defendant is insolvent. This is denied ; but if it were the fact, it could not form a ground for an injunction.

“The next point, and one which would not arise upon a certiorari or appeal, is, that the service was made on Saturday, and that the plaintiff is of the Jewish persuasion and religion.

“By the Statute (5th ed., vol. 2, p. 936, §§ 69, 70, and 71), persons keeping the seventh day holy are exempted from performing certain duties thereon ; and any person who shall knowingly and maliciously cause any process issued from a justice's court in a civil suit to be served on said day on any person, or who shall serve process returnable on such day, shall be guilty of a misdemeanor, and be subject to a fine of \$100, or imprisonment not exceeding thirty days, or both ; and so, for procuring a suit to be tried on that day.

“This is the Law of 1847, ch. 349, now in force. The Statute of May 7th, 1839, under which *Manson vs. Amory* (1 Denio R. 204) was decided, is repealed.

“That authority is enough, under the existing statute, to show that service on Saturday would not be sufficient to avoid the judgment. The service *knowingly and maliciously* is denied, and not in any way established.

“The only remaining ground on which the plaintiff could ask for the interference of the court relates to the merits, viz., the denial of the relation existing, which justifies proceedings under the statute. He contends that he took possession, under the contract of sale, of the premises which is set forth.

“The plaintiff was to consummate his purchase (dated the

28th of March, 1860) by the 20th of April. He was let into possession on the 2d of April. The terms of the contract were, that he was to pay for the property on the 28th of April. The defendant was not bound to let him into possession before. He did so, very clearly, in the expectation and with the implied condition, that he should then pay, according to the contract. His taking possession without any reservation was a waiver of objections to the title. He avows that the only objection he has is the existence of two judgments against a former owner, which, it is alleged, are not liens; that the judgments were against a different person of the same name; at any rate, it is positively sworn that the property is clear.

“I am by no means prepared to say that Henry, the agent, was acting illegally, much less fraudulently, in the affidavit he made to obtain the warrant in the Marine Court.

“But, independently of this, there was open a plain method for the plaintiff to have obtained redress.

“I take it for granted that the Marine Court could have opened the default on a proper application. (*Mitchell vs. Menkle*, 1 Hilton R. 142; Session Laws 1853, ch. 617, § 5.)

“But again, the 366th section of the Code affords a most complete remedy upon an appeal, in case of a failure to appear and on affidavits showing that injustice would be done, and satisfactorily excusing the default. (See *Forster vs. Capewell*, 1 Hilton R. 47; *Lent vs. Jones*, 4 E. D. Smith R. 52; *Milne vs. Hyde*, 3 *ibid.* 177.)

“I consider that, for every alleged irregularity, or defect, as well as for a full investigation of the merits and justice of the case, the law has provided summary and adequate modes of redress, without recourse to an injunction; and that, if there can be possibly presented a case in which the interference by injunction may be allowed, the present is not one of them.

“Motion for an injunction denied.”

8. Cancellation of instruments.—Whenever a court of equity will exercise the jurisdiction of causing a deed or instrument to be delivered up to be cancelled, it will in general grant an injunction against the proceeding upon, or transferring it until judgment, as well as a perpetual injunction, even when a cancellation can be procured.

“There is no head of equity jurisdiction more firmly established than that which embraces the cancellation of instruments which are capable of a vexatious use, after the means of defence at law may become impaired or lost, or when they are calculated to throw a cloud upon the title, or interest of the party seeking relief. But the jurisdiction does not universally attach on the mere ground that the deed or other contract is invalid. If the invalidity plainly appear on the face of the writing, so that no lapse of time, or change of circumstances, can weaken the defence, it is held that no occasion arises for a suit in equity to decree its cancellation. And the doctrine now is, that such an instrument does not, in a just sense, even cast a cloud upon the title or interest, or diminish the security of the party against whom the attempt may be made to use it. If, on the other hand, the invalidity does not appear on the face, the jurisdiction is not confined to instruments of any particular kind or class. Whatever their character, if they are capable of being used as a means of vexation and annoyance; if they throw a cloud upon title, or disturb the tranquil enjoyment of property, it is against conscience and equity that they should be kept outstanding, and they ought to be cancelled.” (Per Comstock, Justice, in the *N. Y. & N. H. R. R. Co. vs. Schuyler, Cross and others*, 17 N. Y. Rep. 592, 599.)

The action in that case was brought by the Company to settle the claims which arose out of the frauds of the defendant Schuyler, as transfer agent. Cross, one of the defendants, demurred to the complaint.

The demurrer was sustained at Special Term. (See *N. Y. & N. H. R. R. Co. vs. Schnyler*, 1 Abbotts' Rep. 417.) In December, 1855, this decision was affirmed at General Term. (See 7 Abbott, 42.) It was held that the complaint was bad in regard to the misjoinder of causes of action, and for multifariousness.

In June Term, 1858, the Court of Appeals reversed this judgment. (17 N. Y. Rep. 592; 7 Abbott, 41.) The court held that the corporation was in a similar situation as an individual with the legal title to a railroad, receiving the earnings and dividing the profits among those entitled by certificates or declarations of trust. If parties come forward claiming on instruments, to all appearance genuine, but in fact spurious, he would be justified and bound to

call them before the court, and to bring to a determination every claim upon the property resting upon documents and facts giving apparently a character of validity.

The corporation stood in a *quasi* trust relation to the shareholders. It had a similar right as an individual trustee to resort to a court of equity, to have the spurious claims cancelled and annulled. If it rejected them, either to share in profits or vote at elections, it became exposed, not merely to one, but to a multiplicity of suits, involving questions of no inconsiderable difficulty.

The same case came before Mr. Justice Ingraham, in February, 1859 (8 Abbotts' Rep. 239), upon demurrers. Considering that the decision in the Court of Appeals covered, in effect, the whole ground taken in the court below, he overruled such demurrers.

The same case is again to be found in 17 How. Pr. Rep. 464. Injunctions were allowed against all the defendants who had commenced actions before the institution of the general suit; and as to certain actions at issue, bonds were to be given under the statute. (2 R. S. 189, § 70.) The learned judge considered, that the ground of the decision in the Court of Appeals was the removal of a cloud upon the title of the holders of genuine stock, the real shareholders of the company.

In *Field vs. Holbrook* (6 Duer, 597) the subject was fully examined by Mr. Justice Duer, delivering the opinion of the court. It was held that the jurisdiction to order a written instrument to be canceled might be exercised—

1. When it is alleged to be void on grounds of which a court of equity alone has cognizance—

2. When its existence would throw a cloud on the plaintiff's title to real estate—

3. When the instrument is negotiable in its character, as a bill of exchange or promissory note—

4. And when the plaintiff claims to have a defence to the instrument, valid in law, but which he is in danger of losing if the adverse party is suffered to delay the prosecution of his claim.

The relief will not be granted where the instrument is on its face plainly illegal and void; when a deed, from its nature and contents, cannot throw a cloud on the title; nor when a negotiable instrument is merged in a judgment.

The mere fact that a void instrument may be used vexatiously, is not enough to give jurisdiction.

In the particular case, it appeared on the pleadings, that the facts on which the validity of the instrument depended had never occurred. The plaintiff could not be in more danger of a recovery being had against him, than if the instrument had been void on its face.

It may be remarked, as to the first class of cases mentioned by the learned judge, where there is a purely equitable defence to the instrument, that as the Code allows such a defence as fully as legal bars, the reason fails.

9. Administration of assets.—That which was known as a creditor's bill under the system of the Court of Chancery, has been in our State almost entirely superseded by the statute of 1830, giving complete jurisdiction to the surrogate of the whole matter. I presume, however, that the jurisdiction of the court as an equity court has not been superseded. I shall therefore notice some of the leading rules upon the subject, though I cannot think it necessary to enlarge much upon it.

There is one statutory provision also in force, which gives exclusive jurisdiction to such a court, to which the power of the surrogate does not extend. By the 65th section of the statute (2 R. S. 94), the final settlement of the account of an executor is declared to be final, as to certain matters. But by the 66th section, it is declared that the preceding section shall not extend to any case where an executor is liable to account to a court of equity, by reason of any trust, expressly created by any last will or testament.

If, therefore, in addition to the mere simple character of executors, the parties are clothed by the will with something of express trust, the decree of the surrogate cannot be final, and the power of the court of equity is left unaffected, even if the surrogate has any authority.

The rule was well settled, that after a decree for the administration of assets, the court would restrain a creditor from proceeding at law to recover his demand. The decree was in the nature of a judgment in favor of all the creditors.¹

¹ Bank of England *vs.* Morris (Forester's Rep. 217); 2 Brown's P. C. 405. Cases cited, Hoffman's Masters in Chancery, p. 187; Innes *vs.* Lansing (7 Paige, 385, and cases).

Such injunction could be had on the application of the executor or administrator; of another creditor, or of a common legatee. (*Brooks vs. Reynolds*, 1 Br. C. Rep. 183; 2 Swanst. 545; *Clark vs. Earl of Ormond*, Jacob's Rep. 122; *Dyer vs. Kearsley*, 2 Merivale, 482, n.)

¶ If, however, a subsequent suit was better framed to do justice to creditors (as by subjecting executors or trustees to a greater liability), the existence of the former action could not be a ground for an injunction.

Thus, in *Sheppard vs. Towgood* (Turner & Russell's Rep. 379), the Master of the Rolls said: "Substantially a bill by one of a set of creditors, on behalf of himself and all others, is considered as making all those others parties to it; and the court will never permit a second or third suit to be instituted for the same object, with the same parties, and directed to the same relief. But, on the other hand, it never can be contended, nor is it the law of the court, that a second suit may not be rendered necessary, either by collusion in the former suit, or by the inattentive mode of framing it, which may have left out some principal matters of charge against the trustees, or by the omission, from ignorance or negligence, of some important ground of relief. It never can be permitted that the priority of a suit, defective in its nature, is to exclude another suit that may introduce important matters, without which complete justice cannot be done to the creditors."

If a creditor recover at law against an executor a judgment *de bonis testatoris*, and a decree is made in a suit for the administration of assets, the court will not suffer execution to be taken out on such a judgment.¹

But if the recovery is *de bonis testatoris, et si non de bonis propriis*, the court cannot interpose to protect the executors from any liability to which they may have subjected themselves. The executor plead the decree at law, where it was held bad. He should have applied for an injunction.²

Clause 2.—The last clause of section 219, marked 2, *ante*, p. 142, allows an injunction in a new and peculiar case. If, during the

¹ *Brook vs. Skinner* (2 Merivale, 481, n.); *Kent vs. Pickering* (5 Simons, 569); *Burles vs. Popplewell* (10 Simons, 384).

² *Burles vs. Popplewell, ut supra*; *Lee vs. Park* (1 Keen, 75).

pendency of the action, it shall appear by affidavit that the defendant threatens, or is about to remove or dispose of his property, with intent to defraud his creditors, a temporary injunction may be granted to restrain such removal or disposition.

The case for intervention is to be made out by affidavits; and the received construction is, that the fact of a threat, or an intention to remove or dispose of the property, must have occurred after action commenced. Hence the facts would not usually appear in the complaint; at any rate, they must be shown by affidavit.

In *Pomeroy vs. Hindmarsh* (5 Howard Pr. Rep. 437) it was held, that the act, to bring a case within this clause, must be done during the litigation, and in violation of the plaintiff's rights respecting the subject of the action. The affidavit did not even show that a suit had been commenced. It disclosed no fact except that one of the defendants stated to the defendants' attorney, that they were unable to pay their debts, and would assign their property, and would not secure the plaintiff in preference to others. A statute which suspends all power of a party over all his property, *pendente lite*, and operates as an attachment, should be strictly complied with. Facts and circumstances should be shown, so that the court can see that a fraud has been threatened, or is about to be perpetrated. This must be made to "appear" to the court, and by proper proof.

So in the case of *Perkins vs. Warren* (6 Howard Pr. Rep. 341), Justice Harris said: "No more radical change had been made by the Code than that contemplated by the single clause in the 219th section, upon which the application was founded." He sustained an injunction upon facts satisfying his mind that there was a disposition of property during suit, with a fraudulent intent.

Upon an appeal to the General Term, the clause was carefully considered. It was said: "It is a most important question of practice to inquire whether, under the last clause of section 219 of the Code, above cited, an injunction may now be obtained during the pendency of the action, that shall stop every business transaction of the defendant and paralyze his power over his property, whenever a plaintiff shall succeed in satisfying a justice of this court, or a judge of the county court, that some transfer of property made by the defendant was so made with the intent to

defraud creditors. If this can now be done, it is not only a new practice, but one most destructive to the business of a defendant. Such an interference, if it could be permitted on a mere claim of indebtedness, would be greatly prejudicial to the commercial interests of the community. It has long been regarded as a cardinal principle, that the legal right of the plaintiff must be established before he can call to his aid the extraordinary power of a court of equity; and a writ of injunction should never be granted where there was doubt about the legal right. The law was still more careful in protecting a defendant from interference by an injunction that would suspend all his business operations; for in addition to establishing the legal right by the recovery of a judgment, it required the plaintiff first to make the attempt to collect his demand by execution.

“If the law is now changed so as to permit an injunction like this to issue *pendente lite*, then our practice presents this extraordinary feature, that the same remedy may now be had on application before judgment, as on application after judgment and execution returned unsatisfied. The facts to be set forth would be somewhat different; as, in the former case, it would be necessary to show an intent to defraud, but the remedy would in both cases be the same.

“The statute (Code, § 219) only authorizes a temporary injunction where it shall appear by affidavit that the defendant *threatens, or is about to remove* or dispose of his property, with intent to defraud his creditors; and then the injunction can only restrain ‘such removal or disposition’—that is to say, the removal or disposition threatened, or about to be made. If it be a threat to remove property generally, the injunction may, perhaps—there being no other objection—be as general as the threat. But I am inclined to think the statute was only intended to prevent the consummation of some particular act which the defendant threatens or is about to do, rather than to restrain generally the sale or disposition of property, and thus tie up all the business concerns of the plaintiff, pending a litigation.

“But it is only when the act is threatened, or about to be done, and not when it has been done, that this court is authorized to interfere during the pendency of an action. The remedy given is preventive merely. The facts disclosed by the affidavits did not bring the case within the terms of the act. Here the property

had been sold and conveyed, and there was no proof whatever that the defendant threatened, or was about to remove or dispose of the notes he had received for the property."

In *Brewster vs. Hodges* (1 Duer, 609), the questions raised turned upon the proper construction of § 219 of the Code, and the judges consulted by Campbell, J., were all of opinion that, upon a motion to dissolve an injunction order, granted during the pendency of an action under the last clause of that section, the only question to be considered is, that of fraudulent intent. Affidavits denying the debt sworn to by the plaintiff, cannot properly be received. They were also of opinion, that the effect of the temporary injunction, that can alone be properly granted in such a case, is not to restrain any removal or disposition whatever of the defendant's property, but only such a removal or disposition with intent to defraud creditors. The words of the clause under consideration are: "When during the pendency of an action it shall appear by affidavit, that the defendant threatens, or is about to remove or dispose of his property, with intent to defraud his creditors, a temporary injunction may be granted to restrain *such* removal or disposition."

Section 220.

An injunction may be granted:—

1. At the time of commencing the action—
2. At any time afterwards before judgment—
3. Upon satisfying the court or judge, by affidavit—
4. Of the plaintiff, or some other person—
5. That sufficient grounds exist for it.
6. A copy of the affidavit must be served.

"At what time it may be granted.

"The injunction may be granted at the time of commencing the action, or at any time afterwards before judgment, upon its appearing satisfactorily to the court or judge, by the affidavit of the plaintiff, or of any other person, that sufficient grounds exist

therefor. A copy of the affidavit must be served with the injunction."

This was the 193d section of the Code of 1848. No change has been made, except that in 1849 the words "to the court or" were inserted.

1. Granted at commencement of action.—By section 127, a civil action is commenced by service of a summons. By section 139, the court obtains jurisdiction from the service of the summons, or allowance of a provisional remedy.

The injunction order may be granted by the judge, and delivered to the party applying, before actual service of the summons, that is, before the action has been absolutely commenced; otherwise, the words "at the time of commencing the action," would be unmeaning. The order would necessarily be afterwards. But the injunction order cannot be operative until the summons has been served. A service prior to that of the summons would be irregular. A contemporaneous service is correct. (*Liffingwell vs. Chave*, 19 Howard, 54, Superior Court, Woodruff, Justice. Concurred in by two justices.)

As section 135 declares, there shall be service by publication, and section 137 provides, that in cases mentioned in section 135, the service of the summons shall be deemed complete at the expiration of the time prescribed by the order for publication, it may be considered that the injunction order may be made, at least at the date of the order for publication.

2. Or afterwards before judgment.—The order may be had after action commenced, at any time before judgment. This clause implies that the ground of the order may have existed at the commencement of the suit; indeed may have been stated in the complaint, though it has not been deemed necessary to apply before; or that the ground has arisen subsequently, when it must be made to appear by affidavit, and when it could not have appeared in the complaint, or a prayer been made for it. The clause of the 119th section, "where during the litigation it shall appear that the defendant is doing some act in violation of the plaintiff's rights, respecting the subject of the action," imports, that facts may have arisen after the complaint, to warrant an injunction.

Under the first branch of section 219, as before observed, the injunction must be the relief, or part of the relief, demanded. Under the second, it need not be so. But it does not follow, that the facts may not have existed when the suit was begun, provided there is a continuation of the prejudicial acts at the time of the application. It is to appear that the party is doing, or threatening to do, something violating the plaintiff's rights.

3. Judge to be satisfied by affidavit.—A complaint duly verified in the manner prescribed by the Code, serves as an affidavit upon which to procure an injunction, if the facts are alleged in a sufficiently positive manner.

In *Woodruff vs. Fisher* (17 Barb. Rep. 229) Justice Hand held, that the positive verification of a complaint was tantamount to an affidavit; that the true construction of sections 219 and 220 was, that if the motion for an injunction was for causes existing at the commencement of the suit, and these are fully set out in the complaint, under positive allegations, and an injunction asked thereon, the ordinary verification of the complaint was sufficient. If the cause for an injunction arises during the litigation, then, as a general rule, there must be an affidavit.

Levy vs. Levy (6 Abbott, 89), before Justice Hylton; *Badger vs. Wagstaff* (11 Howard, 562), before Justice Morris; *Minor vs. Terry* (6 Howard, 208), before Justice Gridley, are to the same effect. I am not aware of any case to the contrary, except *Millikin vs. Cary* (5 Howard, 272), examined by Justice Gridley. It cannot but be observed, that the reasoning of Justice Sill, in *Millikin vs. Cary*, is very strong.

In *Fowler vs. Burns* (Superior Court, General Term, Nov. 1860, stated fully *post*, section 225), it was observed, that the complaint was a pleading in the cause; and with or without a verification, it is a pleading, and has its appropriate office. It is not an affidavit, and there is neither reason nor propriety for calling it an affidavit for any purpose. It may be annexed or prefixed to an affidavit. When any paper is annexed to an affidavit and it is sworn that the statements in such paper are true, the whole is an affidavit. The plaintiff may save himself the trouble of transcribing the allegations of the complaint, by annexing his complaint to an affidavit, which shall refer thereto, and amount to an oath that the allegations are true. To say that

the complaint may be treated as an affidavit, will confuse, unless it is understood that it must be so incorporated in an affidavit, by reference, as to become part of it.”¹

But the complaint must also be laid before the judge. No injunction can be allowed without it.

In *Morgan vs. Quackenboss* (22 Barbour, 76), Mr. Justice Harris, recognizing that this was indispensable (as it must appear by the complaint that the plaintiff was entitled to relief), found the document laid before him, though entitled an affidavit, possessed all the essentials of a complaint, and acted upon it.

It is apparent, from section 219, connected with this section, that the judge is to see that a *prima facie* case is made out for relief *by the complaint*, either for an injunction solely, or that the remedy by injunction will be appropriate; and, by an affidavit, he is to be satisfied, *prima facie*, of the verity of the facts upon which the injunction is sought. The complaint must be before him, when the application is made during the litigation, as well as at the commencement of the action, because he is to see that the act sought to be restrained is in violation of the plaintiff's rights, *respecting the subject of the action*, and tending to render the judgment ineffectual.

4. Of the plaintiff, or some other person.—The section allows the affidavit to be made by the plaintiff, or any other person.

It may be stated that, in general, the affidavit ought to be made by the plaintiff himself, unless sufficient reasons are assigned for his not doing so. This was held to be the English rule in *Spalding vs. Reely* (7 Simons' Rep. 377).

It is a common practice for the affidavit to be made by an agent, or attorney in fact, where the plaintiff is a resident abroad, or some peculiar circumstances prevent the plaintiff swearing to it. One important rule regulates the subject. The court expects the affidavits to come from those actually cognizant of the facts, and who can make positive allegations respecting them.

In *The Bank of Orleans vs. Skinner* (9 Paige, 305), the Chancellor said: “That an injunction bill, filed by a corporation, may

¹ I think an attorney would act prudently, at least, if he made the material facts on which the injunction should be granted the subject of a separate affidavit, even at the expense of much repetition.

be verified by the solicitor or counsel, or other agent, without the oath of any of the regular officers, where the person verifying the bill is better acquainted with the facts than any of such regular officers. If there is any material allegation, on which the right to an injunction rests, which is not within the personal knowledge of the complainant, or of the agent or attorney who verifies the bill, there should be annexed the additional affidavit of the person from whom the information is derived, verifying its truth."

5. That sufficient grounds exist for it.—It seems to be settled that the mind of the judge may be satisfied by affidavits, strictly so termed, alone, or by the complaint alone, if duly verified and sufficiently positive, or by the two united making out the sufficiency of the grounds. These grounds must be the establishment, presumptively at least, of a case within one or other of the provisions of the 219th section.

The satisfaction is to be that judicial result which a judge arrives at, on the case and proofs presented to him.

In general, an injunction will not be granted where the facts are stated merely on information and belief.

In *Jones vs. Atterbury* (1 Code Rep. N. S. 87), Mr. Justice Daly said: "An order for an injunction cannot be made, unless the allegations in the complaint, upon which the party relies, are verified positively. The material allegations in this complaint are all stated on information and belief. Nothing is sworn to as of the party's own knowledge."

In *Crocker vs. Baker* (3 Abbott, 182), Mr. Justice Whiting observed: The facts necessary to sustain an injunction must be sworn to positively. If stated in the complaint positively, and sworn to, it may be sufficient. If stated on information and belief, they must be established by positive affidavits. Mere information and belief are insufficient."

It was ruled, in *Hertz vs. The Long Island Railroad Co.* (13 Barbour, 646), that it was not competent for the plaintiff to add materially to the causes of action set forth in his complaint, by an affidavit. He may, for the purpose of obtaining an injunction, thus fortify his original claims; but he cannot enlarge them, or prefer others. The plaintiff in that case had alleged that he had been for five years past, and then was, *possessed* of the property in question; and, by his affidavit, he averred that he owned the property in fee.

6. A copy of the affidavit to be served.—The concluding clause of the section directs that a copy of the affidavit must be served with the injunction.

In *Penfield vs. White* (8 Howard, 87), the only paper served on the defendant with the injunction order was the summons. "The defendant could not know whether the injunction was granted on a complaint duly verified, so as to make it an affidavit, or on a separate affidavit, independent of the complaint, or in the absence of both. The object of the provision was to apprise the defendant of all the facts alleged, on which the injunction was granted, to enable him to proceed at once to vacate it." The service was held irregular, and set aside. But a motion to vacate the order was denied. No fact was before the court on which that could be properly granted.

In *Watson vs. Fuller* (9 Howard, 425), a motion for an attachment was denied, on the ground that the party was not served with the affidavit upon which it was allowed.

In *Davis vs. The Mayor, &c.* (1 Duer, 451, 485, 511) it was intimated that the omission to serve the affidavits would not justify disobedience to the order, though it might be ground to set it aside for irregularity. When the injunction is plain and explicit, and leaves no doubt as to the act to be done or refrained from, it might be doubted whether the omission to serve the affidavits would justify disobedience. The purpose of this provision of the Code was not that the party may determine whether he will or will not obey, but to enable him, without delay, to apply for a dissolution.

Section 221.

1. No injunction allowed after answer, unless upon notice or order to show cause.
2. But restraint may be ordered until decision.

"Injunction after answer."

"An injunction shall not be allowed after the defendant shall have answered, unless upon notice, or upon an order to show cause; but, in such case, the defendant may be restrained until the decision of the court or judge granting or refusing the injunction."

This was section 194 of the Code of 1848, and no change has been made in it since that time.

1. Notice necessary after answer.—By the English practice, when a defendant had appeared and answered, an injunction could be obtained, either upon the insufficiency of the answer, or by moving for it on the merits as confessed in the answer.

In *Mansfield vs. Cook* (Exchequer, May, 1788, 1 Fowler's Exch. Pr. 207), after demurrer overruled, and a plea ordered to stand for an answer, with liberty to except, an injunction was allowed, upon the merits confessed in the answer after notice.

The practice of exceptions no longer exists ; but, upon a motion for an injunction after answer, the character of the answer would be examined, to see whether it did not support, by admission or non-denial, the equity made by the complaint.

The application under this section is a motion strictly, and is governed by the same rules.

As to the effect of the answer on the motion, and the admissibility of affidavits generally, see *post*, sections 225 and 226.

2. Restraint until decision.—The party may be restrained from doing the act sought to be enjoined until the hearing of the motion, and the decision of the court or judge thereupon.

Upon the nature of such an *interim* order, see *post*, section 223.

Upon the question whether security must be given on such an order of restraint, see *post*, section 223.

Section 222.

1. When no security is directed by statute—
2. A written undertaking must be required—
3. On the part of the plaintiff—
4. With or without sureties—
5. To pay such damages to a specified amount—
6. As the party may sustain from the injunction—
7. If the court finally decide that the plaintiff was not entitled to it.
8. The damages may be ascertained by reference or otherwise.

“Security upon injunction—damages.”

“Where no provision is made by statute as to security upon injunction, *the court* or judge shall require a written undertaking on the part of the plaintiff, with or without sureties, to the effect that the plaintiff will pay to the party enjoined such damages, not exceeding an amount to be specified, as he may sustain by reason of the injunction, if the court shall finally decide that the plaintiff was not entitled thereto. The damages may be ascertained by a reference, or otherwise, as the court shall direct.”

This section is the same as that (the 195th) of 1848, except that the words “the court” above italicized, were added in 1849.

History of the provision.—“The system of requiring security was for a long time unknown in England, with the exception that when a plaintiff at law was out of the kingdom, the plaintiff in equity, after verdict, was compelled to deposit the amount recovered (2 Cox’s Cas. 330). It seems, however, that the practice is now prevalent. (Novello *vs.* James, 31 En. L. & Eq. Rep. 280.)

“The 42d rule of the Court of Chancery of our State, adopted in 1806, provided for a deposit in such a case. The Revised Statutes of 1830 directed security to be given in various stages of proceedings at law, which the injunction was to restrain. The 31st rule of 1839 provided, that where no special provision was made by law as to security, the officer allowing an injunction might require of the complainant or his agent a bond with security, or his own bond only, to the party enjoined, in such sum as might be deemed reasonable, conditioned to pay such party all damages he might sustain by reason of the injunction. The reasons for adopting this rule will be found stated in Edwards *vs.* Bodine (4 Edwards’ Ch. Rep. 192). On the revision of the rules, in 1837, this rule was retained, with some modifications. One was, that the security should not be less than \$500; and this clause was added: ‘Such damages to be ascertained by a reference to a master, or otherwise, as the Chancellor or Vice-Chancellor, having jurisdiction of the cause, shall direct.’ (Rule 31.)

“In the rules of the Supreme Court of 1847, after the new constitution, the last-cited rule was adopted in nearly the same language. There was added a clause that the injunction should

not be allowed on the plaintiff's bond only, unless he justified in an amount equal to the penalty." (Rule 21.) Per Hoffman, J., in *Wilde vs. Joel* (15 Howard, 320, 324).

1. Case of statutory provision for security.—It has been decided that the provisions of the Revised Statutes as to the security to be given upon an action to set aside a judgment, and stay proceedings under it, are not repealed by the Code.

In *Cook vs. Dickerson* (2 Sandf. Super. Ct. Rep. 691, 1850), the action was to set aside a confession of judgment on the ground of fraud in not fulfilling the conditions on which it was given, of canceling a mortgage and giving up securities. An injunction had been granted on an undertaking executed by the plaintiff, in the form prescribed by the Code. On appeal from an order to set the injunction aside, it was held that the Revised Statutes (2 R. S. 189, §§ 141 to 149 [147 to 154]), as to the terms on which proceedings in a personal action after judgment should be stayed, were still in force, unrepealed by the Code.

The case was again before the court, and is reported in 3d Duer's Reports, 324, from which it appears that the judgment restrained was in the Supreme Court, and the undertaking was by Cook and sureties, by which they became bound for a sum not exceeding \$500. The General Term affirmed an order dissolving an injunction, but ordered that it might be restored and continued on giving a bond with two sureties in the amount of the judgment.

The sections of the Revised Statutes referred to in the case relate to injunctions after judgments. The two preceding sections, to an interference before judgment.

It may be questioned whether, under the Code, there is room for the application of these provisions. Every equitable defence can be made in an action; and after verdict, a motion in the cause may be resorted to, probably on any ground which would have justified equitable interference. Terms may be imposed as the condition of a stay of proceedings. Indeed, it deserves consideration, whether a motion is not the only proper course in the same court, between the same parties, in every case specified in the Revised Statutes, after judgment; whether a new action could be regular. Before judgment, the 220th section covers most cases. A motion and a stay would seem to suffice for the

rest. The analogy of the security under the statute might prevail. There may, perhaps, be some peculiar cases for a new complaint and order. See further, on this point, title Restraint of Legal Proceedings, *ante*, page 298.

2. Written undertaking to be required.—*Form.* The undertaking must be in writing. The form is not prescribed, and a substantial compliance with the object of the section will be sufficient.

In *The Episcopal Church of St. Peter's vs. Varian* (28 Barbour, 644), the instrument was in the form of a penal bond, under seal, with a condition in substance that prescribed, by the section, as to the contents of an undertaking. It declared that the three obligors, and each of them, were bound. It was held sufficient; and, also, that judgment could be had against two of them, and in favor of the other, who had a particular defence. •

It seems that the undertaking need not contain the clause as to a reference to ascertain the damages, and that the court may order such a reference without it. •

Justice Parker, in *Higgins vs. Allen* (6 Howard, 30), said: "When an undertaking is executed under the 222d section of the Code, which has been enacted in place of the 31st rule of the Court of Chancery, it seems no provision for a reference is required to be inserted in it; but the same section authorizes the ascertainment of damages by reference, or otherwise. Under the Code there is, therefore, jurisdiction to direct a reference without action, though there be no such consent in the undertaking."

Approval and filing.—The undertaking must be approved by the judge, the approval indorsed, and it must be filed with the clerk, unless the Code expressly provide for a different disposition thereof in a particular case. (§ 423, Rule 4.)

If this is neglected for five days after the order is granted, the defendant is at liberty to move the court to vacate the proceedings for irregularity, with costs, as if no undertaking had been given. It is presumed that section 174 will apply to such a case, and time may be granted to file it. In *O'Donnell vs. McMurn* (3 Abbott, 391), where the undertaking had been approved and delivered to a clerk to be filed, who had neglected it, it was decided that the costs of an application to dissolve should be paid

by the plaintiff. Had the omission been by design, the injunction might have been vacated on that ground alone.

The undertaking must be acknowledged or proved in like manner as deeds of real estate, before it shall be received or filed. (Rule 6.)

If it is not properly proven or acknowledged, the defect may be supplied on payment of costs. (*Conklin vs. Dutcher*, 1 Code Rep. N. S. 49.)

3. To be on the part of the plaintiff.—It will be observed that the language as to the undertaking is, in this respect, precisely the same as that used in section 182. It is to be on the part of the plaintiff, with or without sureties. See the construction of this phrase, *ante*, tit. Arrest and Bail, § 182, p. 49.

In the Superior Court of New York, the plaintiff's own undertaking will not be received, unless he justify as being a freeholder or householder, and in double the sum specified over and above all his debts and liabilities. (1 Sandf. Super. Ct. Rep. 701, *a.*)

4. With or without sureties.—In *Ward vs. Whitney* (4 Selden, 442) it was held, under the attachment law, that a bond executed with one surety was sufficient. The statute requires a bond executed by the plaintiff or his agent, with *such sureties* as shall be approved of.

If a non-resident plaintiff apply for an injunction, he must furnish an undertaking executed by a resident surety. (1 Sandf. Superior Ct. Rep. 701, *a.*)

The justice approving of the security must require the sureties to justify. (Rule 6.) The justification must be to the effect that the surety is a freeholder or householder, and worth double the sum specified over and above all his debts and liabilities. (1 Sandf. S. Ct. Rep. 701, *a.*)

If the sureties in an injunction undertaking become insolvent, it is presumed an order may be made that new security be given, or that the injunction be dissolved.

In *Willett vs. Stringer* (15 Howard, 310), on an application to discharge a temporary injunction, an order was made that, upon the defendant's giving security to the plaintiff, it should be vacated. A motion was afterwards made by the plaintiff for a new undertaking, on the ground of one of the sureties being insolvent.

The court held that there was a power to do so, or to restore the injunction, which, on the ground of the security given, and in favor of the defendant, had been vacated. It was a matter of judicial discretion, looking to the sufficiency of the security which remained.

It was noticed, that it had been decided in the Superior Court, that no such application could be made in the case of insolvency of parties to an undertaking on an appeal.¹

An appeal, once perfected, takes the case from the jurisdiction of the court below, except as specially provided. But an injunction remains subject to its control, modification, and discharge, during the progress of the action. The principle of *Willetts vs. Stringer* may, therefore, perhaps, be applicable to the ordinary case of an injunction undertaking on the part of the plaintiff.

In *Anderson vs. Bradford* (5 J. J. Marshall, 74) it was ruled that a motion might be made for further security, upon insolvency of a party to an injunction bond.

5. To pay damages to a specified amount.—The amount in which the parties bind themselves must be specified, and the liability of the sureties will not exceed it. By the former rule (21 of Supreme Court 1847), the sum was not to be less than \$500. The amount will of course vary in different cases. Upon an order to show cause, and an injunction in the mean time, the amount will be less than when the order is, until trial or further order.

The English practice seems to be, to take the bond or security in a general form, to abide by any order the court might make as to the payment of compensation for any damages sustained by the defendant. (*Novello vs. James*, 31 En. L. & Eq. Rep. 280.)

In *Dickerson vs. Cook* (3 Duer, 324), the bond was in the sum of \$1,130 82, conditioned that the parties would pay to Dickerson, &c., the said sum of \$1,130 82, the amount of a judgment in his favor, whenever ordered by the Superior Court. It was held very doubtful whether he could recover against the sureties anything beyond the amount specified, not even interest from the commencement of the action.

In *Lovelace vs. Burnham* (1 Barb. Ch. Rep. 65), the Chancel-

¹ The amendment of 1859, of section 335, provides for this in cases under that section.

lor declared, that although the 31st rule fixed the minimum of the penalty of the bond to be taken on allowing an injunction, still a discretion was to be used in fixing the amount, so that it shall in all cases be sufficient to cover the probable amount of damages which the defendant may sustain. Where the requisitions of the rule were greatly, and without any sufficient explanation, neglected, an injunction was set aside.

In *Ryckman vs. Coleman* (21 Howard's Pr. Rep. 404), on a motion to dissolve an injunction, Justice Ingraham considered that the security given was altogether too small to justify retaining it. The damages that might be sustained could not in anywise be satisfied by it. Having examined some questions in the case, he observed that the motion should be granted. But as the amount was large, and the plaintiff might wish to take the opinion of the General Term on the questions involved, a stay of proceedings might be had on the order granted, provided the plaintiff increase the security given, by an undertaking in \$10,000, to be approved by a justice of the court.

6. Sustained by reason of the injunction.—The obligation of the sureties is, strictly and exclusively, to pay the damages sustained by reason of the injunction; and, necessarily, by reason of the injunction then in existence and force. If that injunction is vacated, and another substituted or granted, the sureties upon the first cannot remain responsible.

This is the substance of the decision in *The Town of Guilford vs. Cornell* (4 Abbott, 220). The case of *Dickerson vs. Cook* (3 Duer, 324) appears to involve the same conclusion. (See page 335.)

7. Liability only on final decision.—The provision of the section is, that the parties are to pay such damages, &c., if the court shall finally decide that the plaintiff was not entitled to the injunction.

In *Dunkin vs. Lawrence* (1 Barb. Sup. Ct. Rep. 447), the injunction was dissolved on the matter of the complaint alone. The court allowed a reference. It was considered that the case was eventually decided under the rule as it existed before the Code. The learned judge held, however, that if the dissolution had been on bill and answer, it would have been otherwise. The injunc-

tion might perhaps have been reinstated on the proofs. That would not have been an eventual decision.

In *Sherman vs. The New York Central Mills Co.* (11 Howard, 209), Justice Bacon held that the court must decide that the plaintiff was not entitled to the order; that this must be a final decision, that is, one made at the termination of the action by a judgment therein, or by the voluntary discontinuance of the suit; and that the decision must be, that the plaintiff was not, at the time of obtaining the injunction, entitled thereto.

The plaintiff's attorney had given notice of an abandonment of part of the injunction, but was proceeding with the action. An application by the defendant for a reference was denied.

In *Weeks vs. Southwick* (12 Howard, 170), a referee had reported, dismissing the complaint with costs, but no judgment had been entered upon his report. A motion for a reference was held to be premature.

But a dismissal of a complaint on a trial, and judgment duly entered thereon, is an implied determination that the plaintiff was not entitled to the injunction. (*Loomis vs. Brown*, 16 Barbour, 325.)

In *Hope vs. Acker* (7 Abbott, 308), while it was held that a voluntary notice of discontinuance and offer of costs terminated the action and vacated the injunction, and an order of discontinuance might be made, the court would not, after such notice, proceed to examine and decide the question, whether the plaintiff was entitled to the injunction, or not. If the facts warranted an action on the undertaking, the defendants could sue and recover their damages.

In *The Methodist Church vs. Barker* (18 N. Y. Rep. 463), a judgment was entered, on the 7th of March, dismissing the complaint in the action in which the undertaking had been given; and on the 17th of March an order of reference to ascertain the damage was made. An order dissolving the injunction had also been made in the progress of the cause, before judgment. The proceedings were sustained in the Court of Appeals. Justice Comstock said: "I can conceive of no case in which such a reference can be defeated on the ground that it is too late after judgment."

8. Mode of ascertaining damages.—The last clause of this

section is similar to that of the 31st rule of the Court of Chancery of 1837, adopted in 1847 as one of the rules of the Supreme Court.

In *Gracie vs. Sheldon* (3 Barbour Sup. Ct. Rep. 232) it was held that those rules required a clause to be inserted in the condition of the bond itself, consenting that the damages should be summarily ascertained upon a reference. The court could not, by a rule, substitute a summary proceeding of its own, in place of the admitted common-law remedy upon obligations of this description.

But the section of the Code is an act of the Legislature, authorizing such a mode of settling the damages. The party who executes an undertaking under it, is presumed to know the law, and assent to be bound by it. It is, therefore, supposed that the rule stated by Justice Parker, in *Higgins vs. Allen* (*ut supra*, p. 327), is correct. In *Loomis vs. Brown* (16 Barbour, 324), the clause does not appear to have been in the undertaking, and an action was ordered to be brought.

The order of reference must be applied for on notice to the plaintiff in the action; but notice to the sureties is not necessary. *Methodist Church vs. Barker* (*ut supra*, p. 37); *Dickerson vs. Cook* (3 Duer, 324).

When judgment is pronounced, dismissing the complaint, the court may perhaps adjudge that the plaintiff was not entitled to the injunction.

In *Griffin vs. Cranston* (Special Term, Dec. 6, 1860), the question was brought before Justice Hoffman, in settling the form of a judgment. The complaint being dismissed, the defendants proposed to insert in the judgment a declaration that the plaintiff was not entitled to the injunction, and a reference to ascertain the damages. The judge was clearly of opinion that the latter was not proper,—if for no other reason, that it might prevent an appeal, as it would not be a final judgment; certainly would prevent one to the Court of Appeals. Upon consideration, he also struck out the declaratory clause. It was wholly unnecessary. It was a consequence of a final decision, but not involved in the regular issues upon which the court passed on a trial.

In *Carpenter vs. Wright* (4 Bosworth, 655), the plaintiff obtained an injunction, giving the undertaking, with the clause, as to a reference, in it. The injunction was vacated on motion.

The plaintiff then entered an order of discontinuance, paying the costs. An order was then made, on notice, for a reference to ascertain the damages of the defendant, which was affirmed on appeal.

The court observe that the reference will settle the measure of liability, but not the fact of liability. That could be more fitly determined in an action upon the undertaking.

And if there is a judgment in favor of the defendant (for affirmative relief, for example), which involves the conclusion that the plaintiff was not so entitled, it would be regular and proper so to adjudge, and direct a reference.

But it is perfectly settled by the Court of Appeals by the case of *The Methodist Church vs. Barker* (*ut supra*), that after the judgment of dismissal has been duly entered, a special application may be made in the cause. In *Loomis vs. Brown* (*ut supra*), the judgment had been entered, the roll filed, and judgment docketed, and two months afterwards the order was made that the damages be ascertained by action on the undertaking.

It is decided by the same case, in the Court of Appeals, that notice need not be given to the sureties of the proceeding before the referee.

The learned judge says: "He does not doubt that the court may direct that the sureties be notified of the proceedings. They may be heard on an application to set aside the report, and send it back for correction. But these were questions of practice."

In several cases in which the author has made orders of this nature, a clause has been inserted, directing such notice to be given to the sureties. (See *Wilde vs. Joel*, 15 Howard, 321.)

What damages.—In the last-cited case, the authorities as to items of damage which could be allowed were examined. It was held—

That counsel fees attendant upon motions or proceedings to dissolve the order were allowable. The claim was not confined to costs alone.

That it was not essential that the fees should be actually paid. If the client was liable, and the fees were reasonable, it was sufficient.

Fees for services in the suit, not directly connected with, or arising out of, the injunction, should not be allowed as part of the damages. Thus fees in prosecuting a reference as to the validity

of an assignment, the assignee in which had been enjoined, were refused.

The cases of *Edwards vs. Bodine* (4 Edw. Ch. Rep. 292; 11 Paige, 224); of *Aldrich vs. Reynolds* (1 Barbour Ch. Rep. 613); and *Coates vs. Coates* (1 Duer, 664), were cited. See also *The Town of Guilford vs. Cornell* (4 Abbott, 220).

The cases in which special damages will have been incurred from loss of the use of property, depreciation, and otherwise, will of course vary, according to circumstances.

In *Willett vs. Scovel* (4 Abbott, 405), a sale under a chattel mortgage was enjoined. Upon answer, the injunction was dissolved; and, on notice to the plaintiff and the sureties in the undertaking, a reference was had to ascertain the damages. The referee or court allowed the costs before notice of trial; motion fee on dissolving injunction, \$10; counsel fee for drawing answer, preparing brief, and arguing motion, \$75; also, the fees and charges of a constable for keeping the property after the injunction, auctioneer's fees for advertising, &c., and attending the sale.

Fees were also allowed for keeping the property before injunction; on what ground, does not appear.

There is one point adverted to in the case of *Wilde vs. Joel* (*ut supra*) which does not appear settled. It is, whether the court can proceed, upon the report of a referee, and order payment against the parties to the undertaking, particularly against the sureties; or whether the reference is not merely to liquidate the damages, and leave the recovery to be had by an action on the bond. The cases of *Bein vs. Heath* (12 Howard's U. S. Rep. 177), of *Russell vs. Elliott* (2 Califor. Rep. 215), and of *Kelly vs. Lockwood* (6 Kelly's Georgia Rep. 72), were referred to, and the judge observed that he did not think there was authority enough to warrant a proceeding to compel payment; at least, it was safest to bring an action.

In *Willett vs. Scovill* (*ut supra*), an order was made that the plaintiff and the sureties in the undertaking pay the amount reported by a referee, as adjusted by the court, and that the defendants have judgment therefor. I have not met with any other authority to this effect. There is an impression with the bar that it can be done.

The court, under this clause of the section, may, of course,

direct an action to be brought on the undertaking, instead of a reference. This is frequently done.

It is unsettled, by the authorities, whether leave of the court should not be obtained for instituting an action on the undertaking. It is, at least, most prudent to apply for it. (N. Y. Central Ins. Co. *vs.* Safford, 10 Howard, 344; Higgins *vs.* Allen, 6 Howard, 30; Griffin *vs.* Slate, 5 Howard, 205.)

Section 223.

1. Order to show cause in discretion of judge.
2. Restriction, in the mean time, may be ordered.

“ Order to show cause—restraint in the mean time.

“ If the court or judge deem it proper that the defendant, or any of several defendants, should be heard before granting the injunction, an order may be made requiring cause to be shown, at a specified time and place, why the injunction should not be granted; and the defendant may, in the mean time, be restrained.”

No change has been made in this section since 1848, when it was the 196th, except by adding the words *the court or*, which was done in 1849.

Mr. Drewry¹ speaks “of the modern practice which had grown up in England of granting what are termed interim orders. They are, in fact, temporary *ex parte* injunctions, which are granted when the plaintiff, not showing quite a case for an injunction absolute, shows a case for giving short notice, and for protection in the mean time. The interim order is, therefore, an injunction obtained *ex parte*, to be in force until the injunction is disposed of on notice. It is generally accompanied by putting the plaintiff on terms to give an undertaking for any damage done to the defendant by the interim injunction.”

In *The Methodist Church, &c. vs. Barker* (18 N. Y. Rep. 463), Justice Comstock observes upon this section: “The temporary

¹ Supplement to Drewry on Injunctions, p. 84; Law Library, vol. 63.

restraint here mentioned is a part of the injunction relief which the Code provides in the cases specified. All temporary injunctions are now in the form of orders, instead of writs, as formerly; and an order which will expire on the day for showing cause, unless then continued, is, to all intents and purposes, an injunction during the intervening time."

The very general practice of the judges of the Superior Court of New York has been to act under this section, and not grant an injunction absolutely, or until further order, in the first instance. The application then becomes a motion, subject to the same general rules as other motions. The consequences are important, particularly in relation to the question of the admissibility of affidavits on the plaintiff's part. This question is considered under sections 225 and 226, *post*.

Security.—It was very early decided, in the Superior Court of New York, that upon an order to show cause, and a restraint in the mean time, security for damages should be required in the same manner as under section 222, then section 195. (1 Sandf. Sup. Ct. Rep. 701, *a*.)

Mr. Justice Comstock, in *The Methodist Church vs. Barker* (18 N. Y. Rep. 463), said: "That before such an order is made (under this section), security may and should be required, as in other cases under section 222."

Some of the justices departed from the view that security was necessary in such a case, and the court reserved its opinion upon the point.

Regarding this as a question of legal rule, it seems difficult to avoid the effect of the 222d section, which prescribes peremptorily that the judge shall require security. This is an injunction, though it last but a day. Looking at it as a matter of discretion, it is much safer to adopt, as nearly an inflexible rule, the practice of the Superior Court.

Section 224.

1. Injunction to suspend business of a corporation.
2. Only to be granted by the court, or a judge thereof.
3. Not to be granted without due notice to the proper officers thereof—
4. Except where the people are a party to the proceedings—
5. And, except in certain cases, to enforce the liability of stockholders, &c.—
6. Unless a written undertaking shall be given, as prescribed—
7. To pay damages, if finally decided that the plaintiff was not entitled to the order.
8. Damages to be ascertained by a reference or otherwise.

“Security upon injunction to suspend business of corporation.”

“An injunction to suspend the ordinary and general business of a corporation shall not be granted, except by the court, or a judge thereof. Nor shall it be granted without due notice of the application therefor to the proper officers of the corporation, except where the people of this State are a party to the proceedings, and except in proceedings to enforce the liability of stockholders in corporations and associations for banking purposes after the first of January, one thousand eight hundred and fifty, as such proceedings are or shall be provided by law; unless the plaintiff shall give a written undertaking, executed by two sufficient sureties, to be approved by the court or judge, to the effect that the plaintiff will pay all damages, not exceeding the sum to be mentioned in the undertaking, which such corporation may sustain by reason of the injunction, if the court shall finally decide that the plaintiff was not entitled thereto. The damages may be ascertained by a reference or otherwise, as the court shall direct.”

By the Code of 1848, section 197 was precisely like the present, except in not containing the exceptions.

In 1849, the two clauses containing the exceptions were added, and the section has remained unaltered since.

For the cases in which injunctions may issue against corporations, see *ante*, under section 219.

It may be here noticed that it seems nearly certain that none but a judge of the Supreme Court can allow an injunction of the nature referred to in this section.

These powers, before 1846, were vested in the Court of Chancery, or Chancellor, and Vice-Chancellors. By rule 31 of 1830, a direct application to the Chancellor or Vice-Chancellor having jurisdiction was necessary.

The Constitution of 1846 abolished the Court of Chancery, and established a Supreme Court, with general jurisdiction in law and equity. The Judiciary Act of May 12, 1847, declared (§ 16) that the Supreme Court should possess the same powers and exercise the same jurisdiction as was possessed by the then present Supreme Court and the Court of Chancery; and the justices of said court shall possess the powers and exercise the jurisdiction now possessed and exercised by the justices of the Supreme Court, Chancellor, Vice-Chancellors, and Circuit Judges, so far as the powers and jurisdiction of said court and officers should be consistent with the Constitution and the provisions of such act.

In *Kattenshott vs. The Astor Bank* (2 Duer, 672), Mr. Justice Bosworth, upon consultation, intimated strongly the opinion that the Superior Court had no jurisdiction in a proceeding under the Revised Statutes for the dissolution of a moneyed corporation.

In *Hinds vs. The Canandaigua, &c., R. R. Co.* (10 Howard, 487), supplementary proceedings were taken before a judge, under section 292, upon a return of an execution unsatisfied. It was held by the General Term of the 7th District, that the section did not apply to corporations; that the provisions of the Revised Statutes as to proceedings in equity against corporations were yet in force, except that the remedy was to be by action, in form the same as in other actions. Those provisions were expressly preserved by section 471 of the Code. It was held, in *Morgan vs. The New York and Albany Railroad* (10 Paige, 290), that the provisions of the Revised Statutes, in reference to creditors' bills against judgment debtors, did not apply to cases where the judgment debtor was a corporation. But, in all such cases, proceedings must be had under 2 R. S. sec. 3.

Notice.—Notice of the application must be given in all cases,

except in the two specified cases of an action in the name of the people, and where the proceeding is to enforce the liability of stockholders (under the act of 1849, and its amendments).

Security.—The clause is that the plaintiff is to give an undertaking, executed by two sufficient sureties. It need not, therefore, be executed by himself.

In *Hutchinson vs. The New York Central Mills* (2 Abbotts' Rep. 394), it was ruled that where a judgment creditor of an insolvent corporation brought suit for an injunction, to restrain other creditors of the company from proceeding at law, and for the appointment of a receiver and an equitable distribution of the corporate assets, he need not give the bond or make the deposit prescribed by the Revised Statutes respecting injunctions to stay proceedings at law. (2 R. S. 188, § 139.)

The judge cites the 56th section of the statute (2 R. S. 466), and says: "This, I apprehend, is an independent provision of the statute, and not at all subject to those general provisions in regard to actions to stay proceedings at law, and which require a bond to be executed, or a deposit to be made, before an injunction can be obtained."

Section 225.

1. If an injunction is granted without notice—
2. The defendant may apply, on notice—
3. At any time before trial—
4. To any judge of the court in which the action is brought, to vacate or modify it—
5. On the complaint and accompanying affidavits—
6. Or upon affidavits on his part, with or without the answer.

"Motion to vacate or modify injunction."

"If the injunction be granted by a judge of the court, or by a county judge, without notice, the defendant, at any time before the trial, may apply, upon notice, to any judge of the court in which the action is brought, to vacate or modify the same. The application may be made upon the complaint and the affidavits

on which the injunction was granted ; or upon affidavits on the part of the defendant, with or without the answer.”

The 198th section of the Code of 1848 was the same as the present provision, and no alteration has been made since.

1. Injunction without notice.—The section applies only to the case of an injunction ordered without notice. When, therefore, it has been made on the regular notice for a motion, or an order to show cause, the section will not apply, and the remedy, it would seem, could only be by appeal under section 343, and the other sections as to appeals.

The judge who made the order has the power to vacate an *ex parte* injunction order without notice, but it should only be done where serious loss would arise from the delay in serving notice. (*Bruce vs. The Delaware and Hudson Canal Co.*, 8 Howard, 440. G. T., 3d District.) Section 324 applies to injunction as well as other orders.

2. Motion to vacate.—The application must be on notice ; an order to show cause is equivalent.

3. Before trial.—And must be made before trial.

4. To any judge of the court.—It may be made to, or the order to show cause be granted by, any judge of the court in which the action is brought.

5. On complaint and plaintiff's affidavits.—The motion may be made on the plaintiff's case, as presented in his complaint, and accompanying affidavits, if any, on which the injunction was granted. The ground may be the insufficiency of the case made for any relief whatever, its insufficiency for relief by injunction at all, or for that injunction which has been allowed.

6. On affidavits of defendant, &c.—When the motion was made on the complaint and answer, the ordinary rule before the Code was that, if the whole merits and equity were fully denied by the answer, the injunction should be dissolved. But there were exceptions to this rule, and these were for the most part resolvable into the principle of irreparable mischief ; such as cases of asserted waste, or of asserted mismanagement in partnership concerns, or of asserted violations of copyrights or patent rights. In cases of this sort, the court will look at the whole circumstances, and will continue or dissolve the injunction, in the

exercise of a sound discretion. This doctrine is, I think, fully borne out by Lord Hardwicke, in *Potter vs. Chapman* (Ambler's Rep. 99 ; 1 Dick. 146) ; by Lord Talbot, in *Gibbs vs. Cole* (3 P. Wms. 255) ; by Lord Kenyon, in *Strathmore vs. Bowles* (1 Cox. Rep. 263 ; 2 Dick. 673) ; by Lord Eldon, in *Norway vs. Rowe* (19 Vesey, 153) ; and *Peacock vs. Peacock* (16 Vesey, 49). A doubt, too, in point of law, will furnish sufficient ground against dissolving an injunction, as was ruled in *Maxwell vs. Ward* (11 Price R. 17). Indeed, Mr. Chancellor Kent, in *Roberts vs. Anderson* (2 John. Ch. R. 204), laid down the rule generally, "that the granting and continuing of injunctions must always rest in sound discretion, to be governed by the nature of the case." (And see Story, Justice, in *Poor vs. Carleton*, 3 Sumner Rep. 70.)

The same rule is laid down in the cases of *Moor vs. Hylton* (Devereux Eq. 429) ; *Bank of Monroe vs. Schermerhorn* (Clarke's Rep. 303) ; *Merwin vs. Smith* (1 Green's Ch. 138) ; and *Chetwood vs. Brittan* (1 Green's Ch. 439).

Nature of the averments of the answer.—In *Poor vs. Carleton* (3 Sumner, 70), before cited, Justice Story states another rule thus : "But supposing the doctrine were as comprehensive as to the dissolving a special injunction on the coming in of the answer as the counsel of the defendants has contended, the question occurs whether it is applicable to all kinds of answers which deny the whole merits of the bill ; or whether it is applicable to such answers only as contain statements and denials by defendants consonant of the facts, and denying the allegations upon their own personal knowledge. It seems to me very clear upon principle that it can apply to the latter only. The sole ground upon which the defendants are entitled to a dissolution of the injunction upon an answer is, that the answer in effect disproves the case made by the bill, by the very evidence extracted from the conscience of the defendant, upon the interrogation and discovery sought by the plaintiff to establish it. But what sort of evidence can that be, which consists in the mere negation of knowledge by the party appealed to ? It is upon this ground that it has been held, and, in my opinion, very properly held, that if the answer does not positively deny the material facts, or the denial is merely from information and belief, it furnishes no ground for an application to dissolve a special injunction. The cases of *Roberts vs. Anderson* (2 John. Ch. Rep. 202, 204) ; *Ward*

vs. Van Bokelin (1 Paige's Rep. 100); *The Fulton Bank vs. The New York Sharon Canal Co.* (1 Paige's Rep. 311); *Rodgers vs. Rodgers* (1 Paige's Rep. 426), are fully in point."

Denial on information and belief.—A denial of the equity of the bill, upon information and belief alone, was not enough to obtain a dissolution of an injunction.

In *Ward vs. Van Bokelin* (1 Paige, 100), the Chancellor said: "The answer in this case is put in by defendants, who probably knew nothing of the transactions charged in the bill to have been fraudulent. Their answer of course can only deny the equity of the bill, on information and belief. They cannot deny the facts upon any information they possess. The answer, therefore, is not sufficient to authorize a dissolution of the injunction."

New matter in answer.—An answer under the Code comprises the plea as well as the answer of the Chancery system, apart from the office of the latter as a response to interrogatories. If, like a plea, the answer sets up new matter, as by way of avoidance, it may be used on a motion to dissolve the injunction; but I think it quite clear that it can be used only as an affidavit, so as to admit of counter affidavits.

Mr. Justice Mason in *Florence vs. Bates* (2 Sandf. Sup. Court Rep. 675) held, that an answer which set up matters of avoidance could be used to vacate an injunction, as much as if it were a full denial of the equity. The learned judge cites 3 Daniels Pr. and Drewry on Injunctions, p. 411. The page in Daniel is 1831, Am. Edition. Both Mr. Daniel and Mr. Drewry cite for the proposition the case of *Phillips vs. Langhorne* (Dickens, 148), before Lord Hardwicke.

That case is undoubtedly expressly to the point, that after a plea to the whole bill allowed, an injunction should be dissolved; for a plea allowed is to be considered a full answer.

And in *Mount vs. Fenner* (cited Dickens, 676), the bill was for an injunction to stay the printing of the Book of Common Prayer. Upon the answer, a motion was made to dissolve the injunction, and affidavits were going to be read, but it being suggested that the defendants had put in a plea which went to the plaintiff's title, the court saved the notice until after argument of the plea. The plea was afterwards allowed, and there being then an end of the plaintiff's equity, the defendant had an order to dissolve the injunction.

But if the plea was ordered to stand for an answer, an injunction might be continued, or one granted, upon the case as thus presented. (*Mansfield vs. Cook* in the Exchequer cited 1 Fowler's Exch. Pr. 267.)

I do not see any decided contradiction between the rule that a plea allowed is ground to dissolve an injunction, and the rule explicitly stated in *Allen vs. Crobcroft*, as decided also by Lord Hardwicke, and reported in *Barnardiston* (p. 373), that if an answer admits the equity of the bill, but sets up new matter to defeat it, the injunction shall be continued. Now a plea, even assuming it not to be a negative plea to the whole bill allowed, is a judicial decision that the plaintiff has no cause of action, and so stands until a replication is filed to contest its truth. Mr. Justice Mason condemns the case from the ill repute as a reporter of *Barnardiston*.

Beyond a doubt it is most consistent with the whole theory of an answer in its double character as a response and a defence, that the statement of new matter in avoidance should be regarded as an affidavit merely, upon a motion to dissolve an injunction.

The authorities in our sister States which possess the equity system, are numerous and decisive. Justice Mason cites two cases from the Maryland Reports, supporting the distinction taken in the case from *Barnardiston*. It has been recognized in the same State in the case of *Derry vs. Roberts* (2 Maryl. Ch. Decisions, 157).

The rule in North Carolina is, that the new matter may be met by new affidavits. *Lindsay vs. Etheridge* (1 Dev. & Batt. 38); *Wilson vs. Mace* (2 Jones' Eq. Rep. 5); *Duer vs. Erwin* (7 Iredell Eq. Rep. 250). It is the same in Florida (*Yonge vs. McCormick*, 6 Florida Rep. 368); in Alabama (17 Ala. Rep. 667, *Rembert vs. Brown*); in Georgia (*Lewis vs. Leake*, 9 Geor. Rep. 95); and in the United States Court in California (*United States vs. Parrott*, 1 McAllister C. C. Rep. 271).

So in New Jersey, in the case of *Merwin vs. Smith* (1 Green's Ch. Rep. 182), Chancellor Pennington stated—"That he was glad of the opportunity to have the rule settled as to the admissibility of affidavits on a motion to dissolve an injunction. It was always a subject of difficulty."

"The general rule is, that if an injunction is had on the affi-

davit of the complainant (to the bill), and the motion to dissolve is made on the answer alone, no affidavits on either side can be used. There are exceptions to this rule in cases of waste and irreparable injury.”

“The allegations of the bill will be taken as true where not met and denied by the answer. If the answer does not fully meet the case disclosed by the bill, the injunction will be sustained.

“Where new matter is contained in the answer not responsive to the bill, which is relied on in any way to set aside the injunction, the complainant may read affidavits in contradiction of such new matter.”

In that case, the defendant declining to read the new matter in his answer, upon the motion, the counter affidavits were rejected, and the motion was heard upon bill and answer only.

The authorities since the Code upon the subject, are as follows: Mr. Justice Woodruff, in *The Merrimac Co. vs. Garner* (2 Abbott, 318) adverts to the question as one not then necessary to be decided. Justice Ingraham, in *Minor vs. Buckingham* (8 Abbott, 68), appears to recognize the distinction, and to give the full force of an answer only to one denying the equities of the complaint. Justice Brady, in *Powell vs. Clark* (5 Abbott, 70), declared and acted upon this distinction.

It appears to me, that the point is established beyond any reasonable doubt, that the plaintiff may repel matter of avoidance in an answer, by further affidavits.¹

Several defendants. Answers.—It was a general rule of the Court of Chancery, that the motion to dissolve could not be made, where there were several defendants, until all had answered. But, if all the defendants were implicated in the same charge, the court would require the answers of all, without some special reason to the contrary. If the defendant on whom the real gravamen rested had fully answered the bill, that

¹ The case of *Davis vs. Hackley* (Supreme Court, April 1, 1862, 14 Abbott, 64, n.) has been just published. Mr. Justice Barnard, after consulting with his brethren, held that repelling affidavits might be used by the plaintiff, to meet new matter set up by the defendant. He thought, also, that the defendant might meet such affidavits by additional ones, on his own part.

probably would be sufficient. (*Depeyster vs. Graves*, 2 Johns. Ch. Rep. 148.)

In *Noble vs. Wilson* (1 Paige, 164) the Chancellor said: "In this case, the defendants are all implicated in a charge of fraud, and the exceptions seek a more full discovery of the evidence thereof; three of the defendants admit the exceptions to their answer to be well taken, by submitting to answer them; and the Master has reported in favor of the exceptions to the answer of the other defendant. In addition to this, the answers, as they now stand, do not remove all suspicion of fraud, in relation to the transactions referred to in the bill. The motion to dissolve the injunction is, therefore, denied."

Diligence of plaintiff.—The plaintiff must use due diligence in expediting his cause, or the injunction will be dissolved.

In *Depeyster vs. Graves* (*ut supra*) the Chancellor said: "No steps have been taken in respect to the absent defendants, and no excuse offered for the neglect. There is a want of due diligence in the plaintiff since the obtaining the injunction; and that is always a cause for dissolving it." (17 Vesey, 281.)

If the ground for vacating an injunction has occurred subsequently to filing the answer, it is the course in England to introduce the new matter by supplemental answer, and not to vacate it upon affidavits. It would otherwise appear at the hearing, that the injunction had been dissolved on facts not in issue in the cause." (*Stamps vs. The Birmingham, &c., Railway Co.* 2 Phillips' Rep. 672.)

Counter affidavits.—As to the question of the admissibility of further affidavits on the part of the plaintiff, see section 226.

Section 226.

"*Affidavits on motion.*"

"If the application be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits, or other proofs, in addition to those on which the injunction was granted."

The 199th section of 1848 was precisely the same as this section, and no alteration has been subsequently made.

If the defendant move on affidavits alone, repelling affidavits may, by the express language, be used; if he move on affidavits, or an affidavit with his answer, I understand the plaintiff may equally resort to them. The disputed question is, when he moves on answer alone. In two cases before the Superior Court, at Special and General Term, in October and November, 1860, the subject was extensively examined, and the cases compared. The opinions delivered will exhibit all the questions and authorities upon the point.

In *Redfield vs. Widdleton*, before Justice Hoffman, at Special Term (October 5, 1860), the plaintiff had an order to show cause why an injunction should not issue, with a temporary stay. The complaint alleged an agreement between the parties, under which certain advance sheets of a work by Mr. French, an author and resident of Great Britain, were delivered by the plaintiff to the defendant, to have stereotyped and published. The plaintiff had received them as Mr French's agent. The defendant, on the day to show cause, relied on his answer, and his own accompanying affidavit. It was very explicit in its denial as to the agreement; setting up an employment, for a limited time, of the plaintiff at a salary. It claimed the absolute ownership of the plates, on various grounds.

Affidavits of others were offered, on the part of the plaintiff, and admitted, which bore partly upon the question of the agreement, and particularly upon the facts stated from which the claim of the absolute ownership by the defendant was drawn.

The following opinion was prepared, with a view to an appeal, and to condense the views which had led the judge to similar rulings, in other cases:

"The practice before the Code was settled by rules and decisions as follows:

"Although an answer under oath was waived, the defendant could swear to his answer, for the purpose of moving to dissolve the injunction. As evidence, the answer was to have no greater force than the bill. (Rule 26 of Chancery, 1830; Rule 26 of Supreme Court, 1847.) An answer, even if denying the whole equity, must have been duly verified by oath, to obtain a dissolution. (Rule 27.) Where the plaintiff waived an answer on oath, if, in addition to his usual oath, the material facts in the bill on

which the injunction rested, were verified by the affidavit of a credible and disinterested witness, annexed to and filed with the bill, it should not be a matter of course to dissolve the injunction on the oath of the defendant; but the court might retain it till the hearing. (*Ibid.*)”

“In cases of such affidavits accompanying the bill, the defendant could, upon the motion, read affidavits of witnesses to support his answer. (*Haight vs. Case*, 4 Paige, 525; *Brown vs. Haff*, 5 Paige, 239.)

“In *Markham vs. Markham* (1 Barbour’s Ch. Rep. 374) the Chancellor ruled, that the defendant’s affidavits must be served with his answer, or with the notice of the motion to dissolve.

“The case of *The Village of Seneca Falls vs. Matthews* (9 Paige, 504) settled the important point of practice, that where the complainant gave notice of an application for an injunction, or where the defendant was required to show cause why an injunction should not issue, whether a temporary injunction is or is not allowed in the mean time, the defendant may introduce affidavits in opposition to the motion; and this, although he has put in an answer, denying the whole equity of the bill, or has not answered fully. Upon an order to show cause why an injunction should not be granted, the answer, if put in, is only used as a sworn statement or affidavit, on the part of the defendant.

“And in *Blunt vs. Hay* (4 Sandf. Ch. Rep. 362), after appearance to a supplemental bill and demurrer, upon a motion for an injunction, affidavits as well on the part of the plaintiff as of the defendant were admitted to be read. The Vice-Chancellor said: ‘The motion for an injunction is now made after appearance, and upon notice. I perceive no good reason why it may not be made and resisted like any other motion to the court, upon such affidavits and other papers as are pertinent, which either party may be able to produce. Of course the injunction must be founded upon the matter of the bill, but that matter may be established to the satisfaction of the court, on a motion like this, by any competent evidence, without relying upon the oath of the complainant.’

‘The Chancellor has decided that the defendants may, in such a case, introduce affidavits in opposition to the application; and it is obvious that the complainant may, with equal propriety, fortify his application by similar means.’

“Prior to the act of 15–16 Victoria, ch. 86 (1852), the English practice appears to have been this: If a special injunction was obtained on affidavits, and the defendant moved to dissolve it upon his answer, the affidavits used on obtaining the injunction could be read. (*Custance vs. Cunningham*, 17 E. L. & Eq. Rep. 501.)

“And if a motion to dissolve an injunction was made before answer, upon affidavits on the part of the defendant in reply to those on which the injunction was obtained, counter affidavits were not in general admissible; yet the court would, under special circumstances, give permission to introduce them. (Anon. C. F. Cooper’s Rep. 471, n., cited *Daniel’s Pr.*, p. 1460.)

“The act referred to (15 & 16 Victoria, cap. 86, § 59) provides, ‘that upon an application for an injunction or receiver, or to dissolve an injunction, or discharge an order appointing a receiver, the answer of the defendant shall, for the purpose of evidence on such motion or petition, be regarded merely as an affidavit of the defendant; and affidavits may be received and read in opposition thereto.’

“But in England, prior to this statute, and in our own State, where the motion to dissolve was upon the bill and answer merely, affidavits could not be used. The plaintiff could not support his bill, nor the defendant his answer by them. “The court has gone so far as to admit affidavits to be read in support of allegations made by the bill, where those allegations relate to the acts of the parties, and the defendant, by his answer, has neither admitted nor denied the truth of them. But it is repugnant to the whole course of practice to allow affidavits to be received, in contradiction to assertions positively made by the answer.” (Lord Eldon, in *Morgan vs. Goode*, 3 Merivale, 10.)

“In these cases, the question was simply—How has the answer met the equity of the bill? (*Manchester vs. Day*, 6 Paige, 295; *Haight vs. West*, 4 Paige, 525; *Clapham vs. White*, 8 Vesey, 35; *Drewry on Injunctions*, p. 424, Law Library, Vol. 36; *Eastburn vs. Kirk*, 1 John. Ch. Rep. 444; *Gardner vs. McCutchin*, 4 Beavan, 534; *Barwell vs. Barwell*, 5 Beavan, 373.)

“The character of an answer in equity may usefully be adverted to. It was the defence, that is, the defendant’s case; and it was his examination to matters charged in the bill, with a view to

make out the plaintiff's case, or displace the defendant's anticipated case. The two were united in one record. It has been observed by two eminent writers, that in the Ecclesiastical Courts the answer of a defendant called upon to make discovery under oath, is wholly distinct from the responsive allegation which contains his defence. They regret that the same rule did not prevail in courts of equity. (Wigram on Discovery, pp. 9, 10; Hare on Discovery, 223.)

"In considering the answer in chancery, in the light of an examination, we find some points entirely settled. The complainant had a clear right to a full reply to every pertinent allegation as to which a disclosure was properly required. Special interrogatories, or in most cases the general interrogatory, sufficed for this purpose.

"In compensation for the advantage to the plaintiff of thus obtaining testimony, the defendant had the benefit of using his statements, when fairly responsive, on his own behalf; indeed, of having such credit attributed to them, that one witness alone, however positive, could not overturn them. But this privilege did not extend to such parts of his answer as were not responsive—as were in avoidance, as it was termed. Matters of this kind he was bound to prove at the hearing.

"Here we find the reason of the rule, that upon a motion to dissolve an injunction, an answer denying all the equities was sufficient, and could not be opposed by affidavits. The defendant was, to these points, the plaintiff's own witness.

"Yet even this rule was far from being universal. Many acknowledged exceptions existed.

"They are fully stated by Justice Story, in *Poor vs. Carleton* (3 Sumner, 70). He says: 'In regard to the admission of the affidavits, there are other considerations which require attention. All the affidavits, except that of Josiah Barker, are simply to the point of the insolvency and indigence of the defendant Isaac Carleton, and of the low character, intemperance, and indigence of the defendant Richard Carleton. I cannot doubt that they are admissible, for they are merely to collateral matters, not touched by, or contradictory to, the answers. *Taggart vs. Hewlett* (1 Merivale, 499), and *Morgan vs. Goode* (3 Merivale, 10), and other cases cited by Mr. Swanston in his note to

Smythe *vs.* Smythe (1 Swanston, 256), sufficiently establish this position. Without doubt, the defendants are at liberty to repel such affidavits by counter affidavits to the same points.'

"'In regard to the affidavit of Barker, that is of a very different character, and goes to the proof of the original transactions in the bill, and is in direct contradiction to the negative allegations in the answers.'

"The judge then examined numerous cases, and held, that the affidavit should be admitted in the case before him, on the ground of its analogy to cases of irreparable mischief.

"Such was the state of the law upon this subject when the Code was adopted. The regulations as to the course of proceeding are found in the 225th and 226th sections. By the former, the application to vacate or modify may be made upon the complaint, and the affidavits on which the injunction was granted; or upon affidavits on the part of the defendant, with or without the answer. By the latter section, if the application be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits or other proofs, in addition to those on which the injunction was granted. It is to be noticed, that both these sections refer to a motion to dissolve where the injunction has been granted without notice. The 225th is expressly so.

"If the defendant uses both an answer and affidavits upon his motion, the plaintiff may, as I apprehend, use not merely his original affidavits, if any accompanied the complaint, but fresh affidavits. I read the first clause of the 226th section, as if the words 'with or without the answer,' of the 225th section, were inserted. It is to be noticed, that no word of exclusion, such as *only* or *merely*, is employed.

"If this view is correct, then the answer, when affidavits are also used, becomes nothing more than an affidavit. If it is not correct, then an inference may with much plausibility be deduced, that if the application is on the answer and complaint alone, new affidavits by the plaintiff are inadmissible. The Code has no explicit direction upon this point. It has no provision leading to its solution, unless it be the inference I have noticed. The nature of an answer before the Code has been previously noticed.

"Until the complainant got a perfect answer, free from excep-

tions, he had to deal with what purported to be an answer, only as an affidavit. (*Smith vs. Cleasly*, 10 Simons, 91.) But when the defendant had put in a full answer, everything in it directly responsive to the allegations he had been required to answer, became evidence in his own favor—evidence created by the complainant himself.

“I do not understand that, under the Code, a defendant can, under any circumstances, read his own answer in evidence. If, indeed, the plaintiff read a passage, the defendant is entitled to read the whole. (*Gildersleave vs. Mahoney*, 5 Duer, 383.)

“Mr. Justice Roosevelt has held expressly, that he cannot avail himself of his own averments, whether responsive or not. (*Ames vs. Hurlbut*, 17 Howard, 185). Gridley, Justice, in *Hascall vs. The Madison University* (6 Howard, 210; 1 Code Rep. N. S. 170), decided in the same manner.

“If an answer sets up new matter in avoidance, I think it fully settled that, as to such matter, it is but an affidavit, and may be met by repelling affidavits on the part of the plaintiff.

[The observations upon this point, and the cases cited, which are to be found under section 225, *ante*, were then stated.]

“Upon the general question, there are few points under the Code upon which the authorities are more markedly conflicting. The court, in the Second District, at General Term, has held that where the injunction is granted on a verified complaint, and the defendant moves to dissolve it on a verified answer, the plaintiff is entitled to read additional affidavits. (*Jaques vs. Creson*, 4 Abbott Rep. 282, March, 1857.) Mr. Justice Birdseye examines the authorities then reported, and holds that the verified answer is but an affidavit, and is to be used as such upon a motion to dissolve an injunction. The reasoning of Justice Gridley, in *Hascall vs. The Madison University* (1 Code Rep. N. S. 170, and 6 Howard, 210), is very cogent.

“On the other side, the Supreme Court, in the First District, has, at General Term, decided, that if the defendant move on his answer alone, the plaintiff cannot read new affidavits in opposition, but if he move upon affidavits, with or without the answer, he may do so. The complaint and answer may, when verified, have in certain proceedings all the force of an affidavit, yet there is no warrant for calling them affidavits.

“In *Minor vs. Buckingham* (8 Abbott 68), it was held, by Justice Ingraham, that where the answer was verified by an attorney, who stated that everything alleged was true of his personal knowledge, it was yet but an affidavit, and repelling affidavits could be read. See also *Hollins vs. Mallard* (10 Howard, 540).

“In our own court, the case of *Hartwell vs. Kingsley* (2 Sandf. Sup. Ct. Rep. 674) is an express decision of Justice Sandford, that where the motion to dissolve is upon the answer alone, the plaintiff cannot use any affidavits except those upon which the injunction was granted. The case of ——— *vs. Barker* (March, 1849) is cited in the note as deciding the same point by the whole court.

“See also opinion of Woodruff, J., in *The Merimack Man. Co. vs. Garner* (2 Abbott, 322).

“The rules actually settled upon the whole subject, appear to be—

“If a motion is made for an injunction, on notice, or an order to show cause is granted, with or without an *ad interim* injunction, the defendant may use his answer or affidavits, or both, in opposing it; and in either case the plaintiff may be allowed to read further affidavits of any description.

“If an absolute injunction has been allowed, and a motion is made to dissolve it upon affidavits merely, or upon answer and affidavits, or an affidavit, the plaintiff may use further counter affidavits.

“If the motion is made upon an answer alone, and such motion rests solely or chiefly upon matters of avoidance stated in the answer, such answer, or such portions of it, are to be regarded as affidavit merely, and may be opposed.

“And, to my mind, the strength of reasoning and preponderance of authority is in favor of the proposition, that under the provisions of the Code, even in the simplest case of an answer meeting every allegation on which an injunction depends, and when nothing but the answer is used on the motion to dissolve, repelling or rather supporting affidavits can be allowed.

“I might, however, feel compelled to follow the decisions in our own court referred to; but I cannot but think they will be reversed, if the question comes fairly before the General Term.

“As this is a motion for an injunction, that point does not necessarily arise, and the affidavit was properly read.”

The question came before the General Term on appeal, in the case of *Fowler vs. Burns*, decided by Bosworth, Ch. J., and Hoffman, Woodruff, Moncrief, and Robertson, J. J., November 10, 1860. The opinion was delivered by Mr. Justice Woodruff:

“The complaint in this case alleges that the plaintiff was, on the 25th of April, 1860, the owner of certain articles of furniture, consigned to William and Thomas Burns, doing business as commission merchants, under the name of “Burns Brothers,” for sale: that Burns Brothers being insolvent, made a general assignment to their brother the defendant James Burns, for the benefit of their creditors; and among other property assigned and delivered to him the said property of the plaintiff: That the plaintiff, as soon as he was notified of the assignment, informed the assignee that he was the owner of the said property, and forbade the sale thereof by him: That the said assignee nevertheless sold and delivered the property, claiming to dispose of the proceeds according to the provisions of the said assignment; and that the plaintiff has reason to fear, and does fear, that he will distribute the same among the creditors of Burns Brothers; and that the said assignee is insolvent. Upon these allegations, the plaintiff prays an injunction to restrain such distribution, and that the defendants pay over to the plaintiff the value of the property, and for other relief, &c. The allegations in the complaint are positive, and not stated on information or belief, and complaint was verified in the usual manner by the plaintiff’s affidavit.

“An *ex parte* injunction having been granted, the defendants served their answer, the averments and denials in which were stated as of the positive knowledge of some or one of the defendants, and which was in the usual form verified by the affidavit of all of the defendants; and thereupon they moved upon the complaint and answer that the injunction order be vacated. On the hearing of the motion, the plaintiff offered to read an affidavit in opposition to the motion, and his affidavit was rejected, it being decided by the Justice at Special Term that on a motion by the defendants, upon such complaint and answer, the plaintiff could not read affidavits in opposition thereto; and the motion was

thereupon granted. The plaintiff has appealed to the General Term from the order dissolving the injunction.

“It will suffice to say of the contents of the answer, that it denied that Burns Brothers were commission merchants; or that the plaintiff ever owned the property mentioned in the complaint, or that he ever consigned it, or any part of it, to the said Burns Brothers, for sale on commission or otherwise; and alleges that the firm of Burns Brothers were the sole owners thereof; that they purchased the same in October, 1859. It admits the insolvency of Burns Brothers, and their assignment, and that James Burns has sold the property at auction, and intends to apply the proceeds according to the trusts in the assignment, by paying the debts of Burns Brothers, and denies that James Burns, the assignee, is insolvent; and, in short, it fully meets the case made in the complaint, and if unexplained and uncontradicted, overcomes the equities shown thereby.

“The affidavit offered by the plaintiff explained the contradiction between the complaint and the answer, and tended to sustain the allegations of the plaintiff.

“If the affidavit was properly rejected, the motion to vacate the injunction order was properly granted, in conformity with well-settled rules governing the subject.

“The important question upon the appeal before us, therefore, is whether, when a motion to vacate an injunction order is made, by a defendant upon the verified complaint and his verified answer, the plaintiff may oppose the same by affidavits on his part?

“Under our former system of practice in the Court of Chancery, it was settled that in such case a plaintiff could not read affidavits. It was, therefore, the practice to annex to the bill of complaint such affidavits as the plaintiffs desired, and expected to rely upon, to sustain his injunction, and thus by anticipation meet and overcome any case which he supposed the defendant might make by his answer. (1 Paige Rep. 164; 4 *ibid.* 111.)

“Under the impression produced by long familiarity with the Chancery practice, the provisions of the Code were approached and examined by the Bench and the Bar, and several decisions were made to the effect that when the defendant moved in the

complaint and answer, the plaintiff could not oppose the motion by new affidavits.

“The section to which this construction was given is the 226th, which reads as follows :

“‘If the application be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same, by affidavits or other proofs, in addition to those on which the injunction was granted.’

“It has been repeatedly held, that an answer duly verified is not an affidavit on the part of the defendant, within the meaning of this section, and that opinion was expressed by myself as early as 1855, in *The Merrimack Company vs. Garner* (4 E. D. Smith, 385), following in this particular *Servoss vs. Stannard* (2 Code Reporter, 56); *Hartwell vs. Kingsley* (2 Sandf. Supr. Ct. Rep. 674); and a decision of the General Term of this court there referred to.

“In some of the early cases it was held that an injunction could not properly be granted upon the complaint, when verified in the ordinary manner prescribed by the Code, but that an affidavit must be made in some form more positively authenticating the allegations therein; and also, that on the motion to dissolve, the answer verified in the ordinary mode could not be deemed an affidavit, and be used to rebut the case made by a complaint sustained by a proper affidavit. *Benson vs. Fash* (1 Code Rep. 50); *Roome vs. Webb* (ibid. 114); *Milliken vs. Cary* (id. 250.)

“More recently it was held by the General Term of the Supreme Court of the First District, in *Blatchford vs. The New Haven Railroad Co.* (7 Abbott, 322), that if the plaintiff in the verification of the complaint, swears positively to the facts stated therein, it is sufficient to authorize the granting of an injunction. But the opinion seems to hold that the word affidavit used in the 226th section of the Code, cannot be construed to mean “Answer,” and therefore that when the defendant does not use an affidavit or affidavits on his behalf, the plaintiff is precluded from opposing his motion by new affidavits.

“In *Minor vs. Buckingham* (8 Abbott, 68), and in *Powell vs. Clark* (5 Abbott, 70), the question whether the plaintiff could oppose the motion to dissolve by new affidavits, when the defendant moves on his answer, is said to depend upon the contents of

the answer ; and if it contain new matter, not in mere denial of the plaintiff's allegations, the plaintiffs may read affidavits on the motion.

“ On the other hand, in *Roome vs. Webb* (1 Code Rep. 114), where it was held by Justice Parker that a complaint verified only according to the requirements of the Code, was not sufficient to authorize an injunction, and that an answer thus verified was not sufficient to support a motion to dissolve, it was also held that positive verification of the allegations in the complaint would make it sufficient, and that if the defendant moved on an answer thus verified, the plaintiff may oppose the motion by affidavits.

“ In *Hascall vs. Madison University* (1 Code R., N. S.), it was held by Justice Gridley that when the motion is founded on the complaint and a verified answer, the plaintiff may oppose by affidavits ; and to the like effect is *Krom vs. Hogan* (4 How. Pr. Rep. 225) ; *Schoonmaker vs. The Reformed Dutch Church* (5 id. 265) ; *Hollins vs. Mallerd* (10 id. 540) ; and *Jaques vs. Areson* (4 Abbott, 282).

“ So much diversity of opinion has existed on the subject, that we have deemed it proper to examine the question, and, aided by the discussion since had of the subject, and the opinions of other courts, inquire whether the decision of this court, made soon after the Code was passed, was correct ; and that examination has led us to a conclusion that the decision made herein at Special Term, though made in conformity with the early decision of our own court, is not in accordance with the true meaning of the Code.

“ And first, it is proper to say that we do not think that this question depends upon the manner in which the complaint or the answer is verified. If they are not verified at all, then plainly the plaintiff cannot have an injunction on his complaint. And if the plaintiff have in a proper manner shown himself *prima facie* entitled to an injunction, an answer not verified will be of no service to the defendant on a motion to dissolve the injunction.

“ If the complaint be verified, and may be treated as an affidavit, the fact that the verification is in the form prescribed by the Code for verifying pleadings, is not a conclusive objection to the granting of an injunction. The form of the allegations in the complaint must be regarded, and if in reading the allegations in

connection with the verification, enough is sworn to to show that the plaintiff is entitled to the injunction, it may be granted; it would, we think, be unwise to say of the ordinary verification, that when read in connection with the complaint, it may not *prima facie* establish the plaintiff's case, and warrant an injunction, whatever the allegations in the complaint may be. Like observations in respect to an answer are pertinent, if that may be used as the ground of a motion to dissolve an injunction.

"But without dwelling upon the mere forms by which the plaintiff may establish the facts stated in the complaint, it is clear that he cannot be entitled to an injunction, unless these facts are authenticated in a mode amounting, in substance, to a positive oath. And if an answer can be used, and is relied upon as a ground for dissolving the injunction, the facts stated, or the denials made, must be authenticated in like manner.

"Assuming, then, that the plaintiff has, by his complaint and the verification thereof, or by other affidavits, shown himself *prima facie* entitled to the injunction, and that the defendant moves to dissolve upon the complaint, and an answer sufficiently authenticated, can the plaintiff oppose the motion by affidavits?

"At the hazard of going over the same ground that has been already traversed by others, in the cases above referred to, I deem it proper to review briefly the sections of the chapter relating to this subject, which bear pointedly on the question, premising that the titles or headings of the various sections are part of the enactment itself.

"Section 219 declares '*in what cases*' an injunction may be granted: 1. Where the case made by the complaint, if true, entitles the party to the relief demanded, and such relief consists in the restraint sought. 2. When during the litigation it shall appear that the defendant is doing, or threatens to do, some act which calls for such interference, &c. The third case is not material to this discussion.

"Section 220 declares 'at what time it may be granted,' viz., at the time of commencing the action, or at any time afterwards before judgment. And therein follows the indispensable condition upon which, and upon which alone, the court or judge have any authority to grant the order, to wit, 'upon its appearing satisfactorily to the court or judge, by the affidavit of the plaintiff,

or of any other person, that sufficient grounds exist therefor;’ and it is added, ‘a copy of the affidavit must be served with the injunction.’

“Now, whatever the case made by the complaint may be, there is no warrant whatever for an injunction order, unless it satisfactorily appear by *affidavit*, that the grounds therefor exist. No other section enlarges the authority, and without an affidavit no order can issue. An affidavit must be presented to the court or judge, and a copy of that affidavit must be served on the defendant.

“The obvious truth of this construction has led the courts to say, that within the meaning of this section, a complaint may be treated as an affidavit, (though in *Milliken vs. Cary*, 3 Code Rep. 250, it was held that, when verified in the ordinary form, it could not). See *Minor vs. Terry* (6 Howard, 211); *Smith vs. Ross* (id. 124); *Penfield vs. Webb* (8 id. 87); *Levy vs. Ely* (15 Howard, 395); *Woodruff vs. Fisher* (17 Barbour, 224).

“Concurring in the result thus stated, it is more simple, and will tend less to confusion, to call things by their right names, and to adhere to what has been stated to be the only rule prescribed by the Code, and to the indispensable condition above stated. The complaint is a pleading in the cause; with or without verification, it is a pleading, and has its appropriate office. It is not an affidavit, and there is neither reason nor propriety in calling it an affidavit, for any purpose. It may be annexed, or prefixed, to an affidavit. That affidavit may, by reference to its allegations, be made to incorporate them in the affidavit; but it is the affidavit upon which the application must be made. When any paper is annexed to an affidavit, and it is sworn that the statements in such paper are true, the whole is an affidavit. If the affidavit annexed to the complaint, also serve the purpose of verifying the complaint, so as to require the defendant to also verify his answer, the whole may be called a complaint and verification; but for the purpose of being used on an application for an injunction, it is an affidavit. In other words, as the plaintiff must apply for an injunction by affidavit, he may save himself the trouble of transcribing the allegations in his complaint, by annexing his complaint to an affidavit, which shall refer thereto, and amount to an oath that the allegations are true; and so,

what is in itself but a pleading, shall be, in fact, a part of the affidavit itself, by incorporation therein; and it still remains true, that the injunction is granted on its appearing by *affidavit*, and not in any other manner—by affidavit in fact, and not by construction, that sufficient grounds exist therefor.

“This criticism, I am aware, is in no wise material, except for the purpose of simplicity in the discussion, and clearness in showing, that the Code is, in this respect, simple and consistent in all its provisions on the subject. To say that the complaint may be treated as an affidavit, will confuse, unless it is understood that it must be so incorporated in an affidavit by reference, as to become a part of it, and then the whole does, in fact, become one affidavit. The circumstance that the paper so annexed is a pleading in the cause, does not make the whole any the less one affidavit.

“I pass next to the motion to vacate or modify the injunction (§§ 225, 226), and here the Code is no less explicit. The application may be made in either of two modes:—

“*First*.—Upon the complaint and the affidavits upon which the injunction was granted. There is nothing in this showing that an injunction can be granted upon the complaint, nor anything inconsistent with the views already expressed. It may be very material to examine the complaint, to see whether it states a cause of action, or whether it has stated a case within the 219th section, and just as material whether the complaint is verified or not; but on the question, whether the facts relied upon as sustaining the injunction, are properly sustained by proof (that is, whether the condition upon which alone the court or judge was warranted in granting the injunction, was complied with), the affidavit or affidavits alone are to be consulted. If such affidavits contain, by formal statement, all the necessary facts, they are sufficient. If they are drawn so as to avoid needless repetition, by embodying the allegations of the complaint therein by reference, they are affidavits still, and alike sufficient. Both questions may, therefore, arise on such a motion. Does the complaint state a cause of action and a proper case, and do the affidavits sustain the case upon which an injunction is claimed?

“*Second*.—The defendant may move *upon affidavits* on his part, with or without the answer.

“Here the Code consistently prescribes that the proofs shall be *affidavits*. It permits the defendant to move, not upon his answer with or without affidavits, but upon *affidavits* he may use his answer as auxiliary to his motion, or not, as he pleases; but there is nothing to warrant the idea that he may move on his answer as such. That, like the complaint, is a pleading. But, as has been shown, in relation to the allegations in the complaint, so in relation to the averments and denials in an answer, they may be made to form a part of his affidavit or affidavits. And, as before, it is not necessary that the words thereof should be repeated by actual transcription into the body of the affidavit, the answer, or any part of it deemed material, may be so annexed to and sworn to by the affidavit, that it becomes incorporated therein by reference, and the whole will form one affidavit; and again, as before, the fact that it may also serve all the purposes of, and be in fact one of the pleadings, does not make the whole when so authenticated any the less one affidavit. In such case, the defendant does not move on the answer alone, nor on the answer used as an affidavit, but he moves on an affidavit with the answer.

“Under the views thus stated, the verification of the complaint and the verification of the answer may or may not be a sufficient affidavit to obtain the order, or on which to move to vacate it. The point before us is, and I think it has been sufficiently shown, that the plaintiff must apply for the injunction by affidavit, and however he may incorporate the allegations of his complaint therein, it is still an affidavit; and the defendant, if he moves to vacate upon any papers on his part, must move on affidavit, and has no warrant for moving on anything on his part without an affidavit; and though he embody the answer therein, it will and must be an affidavit still.

“The next section (§ 226) thus provides, that if the application by the defendant be made upon affidavits on his part, the plaintiff may oppose the same by affidavits or other proofs, in addition to those on which the injunction was granted.

“If the construction given to the language of the previous sections is correct, the result is inevitable. The defendant cannot move on his answer without an affidavit. In whatever mode his affidavit is constructed, and though it be a mere oath that the

facts stated in his answer are true, it is an affidavit; and therefore, of necessity, if the defendant reads on the motion what alone, by the previous section, he is authorized to read on his own part, the plaintiff is at liberty to read affidavits in opposition to the motion.

“The Code has treated of complaint and answer in this entire chapter as pleadings. It has described the proofs to be used in obtaining or in vacating an order for an injunction as affidavits, and when the defendant presents such proofs as the ground of a motion to vacate the order, the plaintiff may produce and read new or further affidavits.

“The fact that this court has held otherwise, and that there has been much diversity of decision, has led me to a somewhat prolix discussion, and it may be to a repetition of what has been more concisely said by other judges, who, in the cases above referred to, have come to the same conclusion.

“It follows that the rejection of the affidavit offered by the plaintiff at Special Term was erroneous. We might, perhaps, having that affidavit before us, proceed to dispose of the motion on the whole merits appearing from all the papers; but possibly, had the judge received the affidavit, the defendant might have shown that good reasons existed for allowing him to produce further proofs, or for withdrawing his motion, or for taking a denial with leave to renew. We deem it most prudent and best calculated to do justice, to reverse the order, with leave to the defendant to renew his motion. The costs of the motion at Special Term, \$10, to be costs in the cause, and abide the event of the suit. Under the circumstances, the costs of the appeal should be costs in the cause, and abide the event of the suit.”

Miscellaneous Subjects.

1. Servants and agents, how bound.
2. Members of a corporation.
3. As to persons not parties to the record.
4. Knowledge of order, when equivalent to service.
5. Effect of an amendment.
6. Effect of an appeal.
7. Effect of an abatement.
8. Effect of a *lis pendens* filed.
9. Renewing an injunction on new matter.
10. Mandatory injunctions.
11. Breach of an injunction, and its consequences.

1. Servants and agents, how bound.—The writ of injunction, by the almost uniform practice, contained a clause enjoining the party's agents, servants, attorneys, &c., as well as himself, from doing the act forbidden. The order under the Code generally contains a similar provision.

In *Lewes vs. Morgan* (5 Price's Rep. 42) it was held, that where a receiver of rents and profits had been enjoined from further receiving, &c., the court would commit his attorney for a breach of the order, although he, living at a distance in the country, had not been served with the injunction, where it satisfactorily appeared that he knew of the order.

In *Lord Wellington vs. The Earl of Mornington* (11 Beavan, 180, 181) the injunction omitted the words agents and servants. The steward and agent of the defendant united with him in committing a breach, with knowledge of the order. It was held, that although he could not be proceeded against regularly for a violation of the injunction not served, yet he could be punished for a contempt of the order known to him to be in force, and as a party to the breach.

2. Members of a corporation.—In *Davis vs. The Mayor of New York* (1 Duer's Rep. 451, 482) the subject of an injunction binding the members of a corporation, and subjecting them to punishment for its violation, was fully discussed. It was laid down, "that an order which, restraining a corporation from doing

an act, restrains every officer of it from doing the thing prohibited; and if he does the act, knowing that the order has been made, he is chargeable with the consequences of a violation of an order of the court. The mandate in such cases may be exclusively directed to the corporate body by its corporate name; and there are numerous decisions which show that when such is the form of the order or writ, it is operative and binding, not only upon the corporation itself, but upon every person whose personal action, as a member or officer of the corporate body, it seeks to restrain or control. Every such person is as fully bound to personal obedience as if personally named in the process, and consequently is just as liable for his disobedience. (1 Barb. Ch. Rep. 636.) We understood the learned counsel of the defendants to admit, that in the case of a mandamus, the law is such as we have stated; and we are clear in the opinion, that in respect to the persons upon whom it operates, there can be no distinction between a mandamus and an injunction." These views are substantially sustained in the Court of Appeals, in *The People ex rel. Sturtevant* (5 Selden, 263).

3. As to persons not parties to the record.—There are several cases in which the court will restrain persons not parties to the record, nor the agents of such parties.

Thus, in *The Attorney-General vs. The Duke of Ancaster* (Dickens, 68), an injunction was allowed against a tenant in possession, not a party, to stay the commission of waste.

In *Cassamayer vs. Strode* (1 Simons' and St. 381) an injunction was allowed against a purchaser who had been let into possession without paying the purchase money, from committing waste, in cutting timber, &c. "The purchaser under a decree does, by the act of purchase, submit himself to the jurisdiction of the court, as to all matters connected with that character."

And in *Walton vs. Johnson* (15 Simons, 352) a tenant to a receiver was enjoined from removing hay, fodder, and manure, which, it was contrary to the custom of the country for a tenant from year to year to remove.

So, in *Cholmondely vs. Clinton* (19 Vesey, 261), the application was for an injunction restraining Moutriou from acting as attorney or solicitor of the plaintiff, and from communicating anything which had come to his knowledge as attorney or solicitor

of Lord Clinton, It is not stated in the report that it was granted, but there can be little doubt it was so, or would have been if pressed. (See Drewry on Injunctions, 370.)

4. Knowledge of order when equivalent to service.—Actual knowledge of an order having been made or directed for an injunction, is equivalent to service upon the party or his agents.

In *Osborn vs. Tenant* (14 Vesey, 136), on a motion for a commitment for breach of an injunction, it appeared that the defendant and his attorney were in court when the order was made. Lord Eldon held this to be sufficient.

Vasandran vs. Rose (2 Jac. & Walk. 264) is to the same point. The Lord Chancellor observed that the rule should be subject to the observation that no delay should take place as to drawing up the order and getting it served.

So, in *The People vs. Brower* (4 Paige, 406), the Chancellor stated it to be the settled practice of the court that, if an order is served upon a solicitor, and knowledge thereof is brought home to the party whose duty it is to obey it, he may be punished for a willful disobedience of the order, in the same manner as if it had been personally served on himself. The rule is also recognized in *Davis vs. The Mayor of New York* (1 Duer's Rep. 510).

5. Effect of an amendment.—It was settled by the Court of Chancery of the State of New York, that an amendment by leave of the court did not vacate an injunction, even if the clause without prejudice was omitted in the order of amendment.

The cases are stated in Hoffman's Practice, vol. I., p. 301, *et seq.* In *Selden vs. Vermilya* (4 Sandf. Ch. Rep. 576), Vice-Chancellor Sandford stated such to be the rule.

In *Hope vs. The Sixth Avenue R. R. Co.* (Superior Court, Special Term, Feb. 1854, Hoffman, Justice), the subject was examined upon an application to amend in various particulars. One of the proposed amendments was merely the addition or substitution of a party. As to this, the court observed: "This part of the motion is free from difficulty. Several individuals named were made parties to the original complaint, as persons associated with others, and managing and using the railroad, and doing business under the name and style of the Sixth Avenue Railroad Company. Those individuals put in an answer, in which they stated that the association called the Sixth Avenue Railroad Com-

pany had become dissolved, and, on the 30th December, 1851, transferred all their property and right to a corporation called "The Sixth Avenue Railroad Company, in the City of New York."

"This, then, is merely the case of a necessary party, discovered by the answer of a defendant. An amendment to bring such party in, without affecting an injunction, is matter of course in such a case. Where nothing more is requisite than an allegation appropriate to show why he is a party, Vice-Chancellor Sandford adopted the rule stated in Hoffman's Practice, and held that an amendment of an injunction bill, made by leave of the court, would not affect an injunction, even if the order did not express that it was without prejudice. (*Selden vs. Vermilya*, 4 Sandf. Ch. Rep. 576; 1 Hoffman's Practice, 301.)

"Nor is it an objection to the allowance of this amendment that the record will then present together the original defendants who disclaim all title, and the additional defendants in whom it is vested. It would be unnecessary, perhaps premature, for the plaintiffs to move to strike out the former defendants, until the new parties are admitted. It is not absolutely certain that they may not be still retained. It will be a matter of disclaimer if they are retained in the amended complaint. They may wait until the hearing, when they will have their costs, and may move to dismiss the action as to themselves."

Amendments of another class are those which tend to add to and support the equities of the plaintiff's case, or supply some defect in the manner in which it has been stated.

In the case of *Hope vs. The Eighth Avenue Railroad*,¹ an amendment of this nature was allowed. The court observes: "In the original complaint it is alleged that, by reason of certain resolutions passed in the month of July, 1851, and subsequently, permission was given to the associations called respectively The Sixth and the Eighth Avenue Railroad Companies, to lay a railroad track through certain streets of the city, commencing at the intersection of Chambers Street and West Broadway, etc. It is proposed in an amendment to set out these resolutions at length.

"If this were a bill in equity, before the Code, it would have been a matter of course to have set them forth in that manner.

¹ Superior Court, Feb. 1854, before Hoffman, Justice.

The old orders of Lord Coventry (Beames' Orders, 69) have not been interpreted as prohibiting the setting out an instrument *verbatim*, which lies at the foundation of a complainant's right, or aids in its intelligible assertion. (See 1 Daniel's Practice, 345.) For example, if letters are relied upon as constituting an agreement, they may be set out at length. (6 Mad. Rep. 17.)

"I do not understand the Code to interfere with this rule. These resolutions are not merely evidence of the facts alleged, but contain the facts themselves. They are not mere conclusions of law; and I do not think them chargeable with redundancy. When a pleader states that certain resolutions contain a grant, or bestow a power, and asks a court to act upon them, the natural demand is for their exhibition.

"Then the questions are, whether the introduction of the resolutions by an amendment of a sworn complaint, makes a new case, or one conflicting with the old one; and next, whether such a new or repugnant case can now be made by an amendment, and yet the existing injunction be supported, or one be allowed.

"The careful opinion of Vice-Chancellor McCoun, in *Verplanck vs. The Mercantile Insurance Co.* (1 Edw. Ch. Rep. 46), has been the leading case in our courts since it was pronounced; and the summary of it is, that a party under the privilege of amending, could not so vary a sworn bill, as to make a new case; that material and substantive statements which had been sworn to, could not be stricken out, though they might be corrected by the addition of explanatory and supplementary statements, with leave of the court. It deserves notice, that a bill not sworn to, might be amended in any particular, and to any extent, even so as to make a totally distinct and repugnant case. (*Hall vs. Pomfret*, Daniel's Rep. 111; *Rikey vs. Kimmis*, 1 Beatty's Rep. 310.)

"We should, however, observe, that a 'subpœna' which brought a party into court, was to answer a bill exhibited against him. What that bill was he ascertained upon procuring a copy. But, under the Code, the summons is to state, either that the plaintiff will take judgment for the sum specified, or will apply to the court for the relief demanded in the complaint (§ 129); and where the complaint is not served, notice of the place at which it is, or will be filed, must be given (section 130). So, the com-

plaint is to contain a demand of the relief to which the plaintiff thinks himself entitled.

"This shows that before appearance, at any rate, the plaintiff cannot amend as of course, so as to substitute a new and different cause of action on the amended pleading. (*Field vs. Stone*, 8 Howard, 46.) And as the summons cannot be amended without leave of the court, an amendment making a new case, and for a different relief, would seem irregular. (1 Code Rep., N. S., 157.)

"At any rate, whether amended before appearance or answer, a service must be made of the amended pleading, and the time of the defendant commences from that period. (Section 172, and 1 Code Rep. 37. See, also, 2 Sandf. S. Ct. Rep. 651.)

"But, under the 173d section of the Code, as amended in 1852, an amendment may be allowed by the court, by inserting other allegations material to the case; and the clause, that the amendment shall not substantially change the claim or defence, is confined to the conforming of pleadings to the facts proved, of course at a trial. Justice Harris, in *Beardesley vs. Storm* (7 Howard, 296), treats the Code as not permitting the insertion of allegations which may change entirely the cause of action. Before the amendment, Justice Daly, of the Common Pleas, held that the Code was to be understood in the way in which it is now amended. (*Chapman vs. Webb*, 1 Code Rep., N. S., 388.) The cause of action may be changed, if the claim, viz., the particular relief demanded, remains the same.

"It is obvious that a new case may be made in an amended complaint, which shall not be so contradictory to the former case as to involve the party swearing to each in falsehood. Of course, no court would grant or sustain an injunction, where such was the alternative.

"I think, as the law of amendment now stands, this may be safely stated as to the effect of amendments upon an injunction.

"If they tend to support the ground on which the injunction rests, by other facts or matters, they are, of course, admissible, and will not affect it.

"If they tend to supply other grounds on which it may be sustained, not involving a contradiction of sworn allegations of fact, they are also admissible. And if (with the like qualifica-

tion) they furnish reasons for not only continuing, but for enlarging the injunction, they may be allowed. Thus, if the court can conclude that, had the original complaint been in the same form as it will be if amended, the injunction would have been allowed as it stands, or a more extended injunction would have been made, and no contradiction as to facts exists, I think the amendments may be admitted, and may properly influence the question of the injunction.

“There will be left one case which may possibly arise, when the amendment removes entirely the foundation on which the injunction order proceeded, but substitutes another and sufficient one. I think that, in such a case, by our course of practice, the injunction does not become *ipso facto* vacated, and that the defendant must still apply to dissolve it. And then the rules upon reviving an injunction which had dropped upon amendment, or been dissolved, will apply. A special motion was necessary. (Eden on Injunction, 91.) So, upon a supplemental bill, the original injunction did not fall; or, if it had been dissolved, it could be renewed. (*Darcy vs. Sumner*, 2 Molloy, 359; *Fanning vs. Dunham*, 4 Johns. Ch. Rep. 35.)

“Testing the proposed amendment now under consideration by these principles, it is plain that it contradicts nothing of fact contained in the original complaint. It is equally plain that it does not change the ground on which the injunction was allowed. It may be, that by raising another question, viz., as to the legality of the acts of the corporation, it may strengthen the plaintiff’s right to relief, in the identical form in which it was granted. Certainly it cannot weaken it. It may suggest and require that the Attorney-General be made a party. That could not affect a proceeding warranted by what was in the original complaint. The plaintiffs aver that it will enable them to raise the question of legality of the acts of the corporation. It is admissible as an additional ground for the same relief, because it does not displace the cause of action on which the interposition of the court has already been had.” The amendment was permitted.

6. Effect of an appeal.—This subject may be considered in two aspects. In respect to an appeal from an order granting or discharging an injunction as a provisional remedy—an *interim* injunction; and an appeal from a judgment granting a perpetual injunction, or denying it.

From order at Special Term.—An appeal lies from an order made at Special Term, or by a single judge, to the General Term, when the order grants or refuses, continues or modifies, a provisional remedy. (Section 349.)

If the order grants, continues, or modifies an injunction, the appeal of itself leaves it unaffected. If the order denies an injunction, the appeal of course cannot create one. If any difficulty exists, it is when the order dissolves an injunction.

Before the Code, it was well settled that an appeal (as one from the Chancellor to the Court of Errors) had not the effect of reviving the injunction.

In *Wood vs. Dwight* (7 John. Ch. Rep. 295) the Chancellor said that, after an order dissolving an injunction was entered, no subsequent appeal could of itself affect the validity of the order, or revive the process and give it force and effect. An appeal only stays future proceedings in the cause, but here is no further proceeding. The order is perfect and finished the moment it is entered; and if the injunction could be revived by the mere act of the party in filing an appeal, it would be giving to him not only a power of control over the orders of the court, but of creating an injunction.

The Supreme Court of this State, in *Hoyt vs. Gelston* (13 John. Rep. 139), held that an injunction was not revived by an appeal so as to operate as a stay of proceedings at law. When a process is once discharged, it is gone forever, and it can never be revived except by a new exercise of judicial power.

In *Hart vs. The Mayor, &c., of Albany* (3 Paige's Rep. 381), upon the coming in of the answer the injunction was dissolved. (See *ibid.*, p. 213.) An appeal was taken to the Court of Errors. Then a petition was presented, stating the proceedings, that the destruction of the storehouse would be of serious injury to the complainants, if they succeeded in their appeal, but that it could not be of any material damage to the defendants or the public to have it remain in its present situation until the decision of the Court of Errors. An order was asked, restricting the defendants from proceeding pending the appeal.

The Chancellor, after a very extended examination, held that an appeal from an order dissolving an injunction did not restore it.

In *Graves vs. Maguire* (6 Paige, 379), the Chancellor said: "The effect of an appeal, after the proper steps have been taken to render it a stay of proceedings upon the order or decree appealed from, is to leave the proceedings in the same situation as they were at the time of perfecting such appeal, but not as they were before the order or decree appealed from was entered. If the order appealed from was an order granting an injunction, the same is not dissolved by the appeal, although the power of the court below to punish the party for a breach of the injunction pending the appeal, might, perhaps, be suspended until such appeal was disposed of. (2 R. S. 607, § 89.) And where the appeal is from an order dissolving the injunction, such appeal is wholly inoperative, and cannot have the effect to restrain the proceedings formerly enjoined until such order is reversed, so as to restore the binding force of the injunction."

In *Stone vs. Carlan* (3 Code Reporter, 103) there was an injunction order granted, then an appeal, and afterwards a violation. On an order to show cause why an attachment should not issue, it was held that section 349 did not allow an appeal from an order to have the same effect as a stay, as sections 348 and 342. Section 342 did not apply to injunction orders. An attachment was allowed.

But the Chancellor, in *Hart vs. The Mayor of Albany* (*ut supra*), expressly held that circumstances would justify the court, after an appeal, in exercising an original jurisdiction to restore an injunction; in effect, to suspend the operation of the order of dissolution. He made an order to that effect upon certain conditions. Some traces of a similar power are found in what are termed suspension orders in the English practice.

In general, these orders stay the execution of something directed, or permitted to be done, by the order appealed from. This was the case in *Lewes vs. Morgan* (5 Price, 468), cited by Chancellor Walworth. The orders of the court, before made, so far as they directed the delivering up of possession of the premises, were suspended till further order; but so far as they operated to restrain the defendant in any respect, were to remain in their full force.

In *Walburn vs. Ingilby* (1 Mylne & Keen, 61, 86), Lord Brougham observed: "If this motion were granted upon the allegation

that refusing it will enable a party to do something which cannot be undone, or to obtain some advantage which can never afterwards be wrested from him, it is impossible to conceive any case of an order for paying money out of court, for dissolving an injunction, for appointing a receiver, in which the same ground existing much more plainly, the same course must not be pursued. And thus the very cases where it is of the most essential importance that speedy execution should take place, will be those in which the argument for suspending execution will be most powerful." In other and better words—in the language of Lord Eldon—"the arm of the court will be palsied." (See *Huguenin vs. Bazely*, 16 Vesey, 216.)

Yet the Court of Chancery did sometimes exercise the power. The appeal from an order of the Special Term does not (as I apprehend it now settled) *per se* stay proceedings. (1 Duer, 622; 4 Abbott, 285.) But the judge below may make an order staying proceedings.

Now the suspension of the execution of an order, the execution of which will give the benefit of a declared right to a party, has its converse in the removing of an interdict from doing something prejudicial to an alleged right, which the court has said does not exist. In such case the decision is questioned by an appeal. In the former case, the power to stay is undoubted. It would seem to follow, logically, that it exists in the latter.

The better conclusion seems to be, that the mere power vests in a judge at Special Term to make an *interim* injunction, after an appeal from his order dissolving one.

After judgment.—Mr. Justice Harris, in *Hoyt vs. Carter* (7 Howard, 140), had dismissed a complaint in an action in which a temporary injunction had been granted. He filed his decision, and judgment was entered. Subsequently he made an order so far modifying his decision as to continue the original injunction, to stand in force until the time for the plaintiff to appeal should have expired. The action was to restrain the diversion of a water-course, and the affidavit showed that operations had been commenced by the defendant to divert it since the decision. The learned justice discharged his own order, but without prejudice to the right of the plaintiff to apply to the court, upon notice, to restrain the proceedings of the defendant until the decision upon

the appeal, if any had been or should be taken. He referred to *Hart vs. The Mayor of Albany* (*ut supra*).

In *The Town of Guilford vs. Cornell* (4 Abbott, 220) the General Term reversed a judgment granting a perpetual injunction, and gave judgment for the defendant with costs. After the plaintiff had appealed to the Court of Appeals, he obtained an order at the General Term continuing the injunction theretofore granted, until the decision of the Court of Appeals. The judgment was affirmed. It was held by Justice Balcom, that the sureties in the original undertaking were not liable for damages from the continuance of the injunction and in consequence of the appeal. It was a new injunction, and a new undertaking should have been required.

When a judgment has been obtained for a perpetual injunction, an order to stay proceedings, on the ground of an intended appeal, cannot be sustained.

This was decided in *Howe vs. Searing* (Gen. Term Superior Court, June, 1860). The General Term had affirmed a judgment for a perpetual injunction against continuing the name of *Howe's Bakery*, on signs, wagons, &c. An order granting a stay of proceedings on the judgment until the decision of the appeal to be taken to the Court of Appeals, if such appeal was perfected in ten days, was reversed. The court below could not interfere with the execution of a judgment of the General Term; and when an appeal was taken and perfected, section 342 would operate as a stay. If it did not, no other mode was provided in the law.

It can scarcely be doubted that when an injunction is gone by the dismissal of the complaint, and an appeal has been duly taken and perfected under section 334, a stay of proceedings in the court could be effected so as to prevent the collection of costs, or any proceedings to ascertain the damages sustained by reason of the injunction. Section 342 appears to cover such a case fully.

But when the defendant does not need the exercise of any powers of the court for further consequential relief, but is liberated from a restriction upon performing an act, there must be either a fresh interposition of the court, or the appeal must revive the injunction, or there is no redress. The revival of the injunction seems entirely out of the question.

The cases of *Clark vs. Clark* (7 Paige, 607) and *Burr vs. Burr* (10 *ibid.* 166) are examples of the exercise of a power by

the court to stay proceedings where an appeal, though perfected under the Revised Statutes, could not operate to prevent an act done by the sheriff (as, to sell under execution). It was not a proceeding in the court. Justice Harris thought, it is presumed, there was such a power, when he impliedly granted the permission to make a motion in *Hoyt vs. Carter* (*ut supra*). See, also, *Burrall vs. Vanderbilt* (1 Bosworth, 637), and *Cook vs. Dickerson* (1 Duer, 679), as to what proceedings an appeal stays under the Code by analogy to the Revised Statutes.

In the case of *Genin vs. Chesney* (Special Term, Superior Court, Jan. 1861), an injunction was allowed to prevent the defendant from continuing the use of a sign or device over his eating saloon, next door to that of the plaintiff, which had been used by the plaintiff and his predecessors for over seventeen years, in the same place. An appeal was taken from this order to the General Term, and an application was then made to stay the enforcement of the injunction-order pending the appeal. Mr. Justice Hoffman held that an appeal from an order did not of itself stay proceedings; that the court could stay, upon proper terms, the execution of the order, as well as any other; and that, upon the defendant's executing a bond with one surety, in a certain sum, as liquidated damages, and not by way of a penalty, payable in case the order was affirmed by the General Term or the appeal dismissed, the proceedings might be stayed.

The damages which might arise from persons being misled into going into the defendant's saloon must necessarily be very vague and indefinite. Nothing but liquidated damages would ensure justice to the plaintiff if the order was sustained.

7. Effect of an abatement.—The practice was settled before the Code, that the death of a co-defendant in an injunction suit did not cause the process to fall, but a surviving defendant might obtain an order, on notice, that the complainant revive the suit within a reasonable time, or consent to proceed against the surviving defendant alone, or that the injunction be dissolved.¹

In *Bennett vs. James*, in Chancery, July, 1833,² the Chancellor said an abatement did not dissolve or in any way affect an

¹ Hoffman's Ch. Pr. vol. 1, p. 392, and cases.

² Cited *ibid.*; reported as *Hawley vs. Bennett*, 4 Paige, 163.

injunction. That if the plaintiff had died, and the injunction was violated, an application for an attachment might be made by the representatives of the plaintiff, as soon as they had taken steps by petition or bill to revive. They need not wait until a decree of revivor. The representatives of a deceased defendant might have made a similar motion, notwithstanding their power to revive themselves under the Revised Statutes. See *Stuart vs. Ancell* (1 Cox's Ca. 411), and Hoffman's Ch. Pr., vol. 1, p. 392.

Upon the death of a plaintiff, any defendant might obtain an order that his representatives revive within a specified time, or that the injunction be dissolved.

In *The Duke of Chandos vs. Talbot* (Select Cases in Ch. 24), it was declared that in an injunction case, where it abates by the death of either the plaintiff or defendant, the rule is, that the court shall be moved to revive within a stated time, or the injunction be dissolved.

In *More vs. Thayer* (10 Barbour's Rep. 258), it was held that, as a general rule, a suit was not commenced, where service of the summons is by publication, until the expiration of the time prescribed for publication. Yet where an attachment had issued against the property of the defendant, after which he dies, the court acquired a jurisdiction to enable it to substitute the personal representatives of the deceased in his place, as a party defendant, in order that the summons may be duly served, and the lien of the attachment be retained.

By section 121 of the Code, no action shall abate by the death, marriage, or other disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue. In case of death, marriage, or other disability of a party, the court, on motion, at any time within one year thereafter, or afterwards on a supplemental complaint, may allow the action to be continued by or against his representative or successor in interest.

See, upon the practice under this section, *Keen vs. Lafarge* (1 Bosworth, 671); *Doedt vs. Wiswall* (15 Howard, 128); *Yertore vs. Wiswall* (16 Howard, 8); *Williamson vs. More* (5 Sandf. Supr. Ct. Rep. 647); *Taylor vs. Church* (9 Howard, 190).

8. Effect of a *lis pendens*.—When the action relates to real property, and a notice of a *lis pendens* is filed, dispositions of property so as to affect the plaintiff's rights, should he succeed,

are of course unavailing. And generally, therefore, an injunction to restrain such dispositions, being needless, will not be allowed.

In *Mills vs. Mills* (21 Howard's Pr. Rep. 437), Mr. Justice Lott considered the plaintiff's right to ultimate relief as too doubtful, upon the matters stated, to justify a preliminary injunction. He also observed that he was fully protected by his possession, and by the filing of a notice of *lis pendens* against any alienation or disposition of the property. An injunction was, therefore, unnecessary.

In *Stephenson vs. Zayerweather* (ibid. 449), the same learned judge repeated this proposition, especially as the defendant was amply responsible to meet any claim for loss or damage arising out of the subject-matter of the action.

9. Renewing an injunction on new matter.—A motion to reinstate an injunction on additional facts is, in effect, an original application for an injunction. It will be granted in some special cases.

If the injunction has been dissolved upon the merits, and then the plaintiff amends, a fresh injunction may be awarded, on notice.

In *Travers vs. Lord Stafford* (2 Vesey, Sen., 19) Lord Hardwicke said: "If once an injunction is dissolved on the merits, on answer put in—whether by decree of court on dismissing the bill or on motion on coming in of the answer—if the complainant amends that bill, or files a supplemental bill, with new matter which is part of the old cause, he cannot apply as of course for a new injunction to stay proceedings, though, perhaps, it may be done on special motion."

In *Vipan vs. Mortlock* (2 Merivale, 476) the common injunction was dissolved, on coming in of the answer. The bill was subsequently amended, and the injunction revived upon special application, supported by affidavit of the facts stated by way of amendment. The defendant was in default for not answering the amended bill.

In *Lingham vs. Toule* (1 Anstruther, 188), after injunction dissolved upon the answer, and the bill amended, it was held that a new injunction could not be granted, except upon special application, supported by affidavits.

The subject was examined in *Buckley vs. Case* (Saxton's Ch.

Rep. 504). It was held to be clear that, after an injunction dissolved on the merits, the party may amend, and obtain an injunction on the amended bill. The amendments may be founded on facts disclosed in the answer. There must always be new facts and charges in the amended bill, and these must be material, or a new injunction would not be ordered.

It was not essential that notice of the application should be given. The case as presented by the amended bill was sufficient to sustain the injunction, which had been granted *ex-parte*.

In *Tone vs. Bruce* (1 Clark's Rep. 505) Vice-Chancellor Whitlesley held that the court had power to renew an injunction after a dissolution, although the order had been affirmed by the Chancellor, and an appeal taken to the Court of Errors from that affirmance; that the power could only be exercised upon new facts presented by petition or supplemental bill. He had adverted to the same question in *Jewett vs. The Albany City Bank* (ibid. p. 59), and, holding that the power existed, considered that the case must be very special for its exercise. There must be new facts, or facts unknown at the first motion.

In *Fanning vs. Dunham* (4 Johns. Rep. 35) an injunction had been dissolved, and a supplemental bill was allowed to be filed. On the facts stated in this, a fresh injunction was granted.

10. Mandatory injunctions.—It has been supposed that an injunction could only command the party to refrain from doing an act, but could not order him directly or indirectly to perform an act. This is, however, erroneous. What is known as a mandatory injunction is not uncommon.

In *Rankin vs. Huskisson* (4 Simons, 13) the injunction, as allowed by the court, forbade the defendant from permitting the supports of the building, which had already been erected on the garden or plot of ground, from remaining thereon, &c.

So, in *Spencer vs. Birmingham and London R. R. Co.* (8 Simons, 193), the court say: "The power of the court to grant that species of injunction which Lord Eldon granted—namely, restraining a party from allowing a thing to continue, and which has the effect of making him take some active measures—has been recognized and acted upon; and I do not see why, if that species of negative injunction has been adopted, it should not be adopted here, so far as to prevent the parties from continuing the excavation in its present state."

In *Lord Mexborough vs. Bower* (7 Beavan, 127) an injunction was granted to restrain the defendant (who had cut certain channels from one coal-field into another, in violation of an agreement with the plaintiff) from permitting the communication to continue open.

In *The Great North of England, &c., Co. vs. The Clarence Railway Co.* (1 Collyer's Ch. Rep. 507) the right of the plaintiffs to construct a bridge over the defendants' railway, and to use the defendants' land temporarily under certain conditions for that purpose, was the question in dispute. Upon a trial at law, the Court of Exchequer certified to the legal right of the plaintiffs in both particulars. The defendants had put up a wall which obstructed the plaintiffs in carrying out their works. An injunction was granted by Vice-Chancellor Bruce, and supported by the Lord Chancellor, to restrain the defendants from continuing to maintain such wall, and from preventing the plaintiffs from making their bridge, &c. In effect, the injunction was to compel the defendants to remove their wall. It was held that it was no objection to the injunction that it was, in effect, of a mandatory character.

The statute of 17 and 18 Victoria, cap. 125, §§ 79-82, was before noticed, as conferring upon the courts of common law the power to grant injunctions.

In *Jessel vs. Chaplin* (37 En. L. & Eq. Rep. 472) the injunction, which was made absolute, contained a clause against erecting, keeping erected, and continuing the erection, of so much of the wall and building as is opposite to the west side of the messuage of the plaintiff, &c.

In *Howe vs. Searing* (Superior Court, 1860) part of the injunction adjudged at the hearing was, that the defendant should not continue to use the name of "Howe's Bakery" on any sign or wagon, and should remove a large sign with that name, from a part of the building. The case is reported in 19 Howard's Pr. Rep. 14; but this part of the order does not there appear. Justice Hoffman, who pronounced the order, held that the power to forbid the continuance of a thing, and to punish a party for continuing it, was the same thing as a power to command its removal; and that it was best to make the language express directly what was actually commanded.

The cases before Lord Brougham, of *Blakemore vs. The Glamorganshire Canal Company* (1 Mylne & Keen, 154) and *Milligan vs. Mitchell* (1 Mylne & Keen, 446), only show that on interlocutory applications the court, except in some very special cases, aims only at keeping things in *statu quo*, and will not grant an order which indirectly compels some positive act to be done.

11. Breach of an injunction, and its consequences.—The proceedings in the case of *Davis vs. The Mayor of New York*, and *The People vs. Compton, Sturtevant, &c.* (See 1 Duer, 451; *ibid.* 512; 3 Duer, 616; 4 Duer, 148; 5 Selden, 263), involve the principal questions of practice on this head. Each step was contested by counsel, and received attentive examination in the Superior Court. The statement of the practice there pursued, with a few other points and authorities, will furnish a sufficient guide.

It should be premised, that the Code has left the provisions of the Revised Statutes as to contempts unaffected.

The injunction order (1 Duer, 468) recited, that it appeared from the complaint, duly verified, that the plaintiff was entitled to the relief demanded, and that such relief consisted in restraining the defendants as thereafter provided. Therefore, the Mayor, Aldermen, &c., their agents, &c., were enjoined from granting to Sharpe and others the liberty or right of laying a railroad in Broadway, &c., until the further order of the court.

An affidavit was made of service of a copy of the injunction on the several members of the corporation named; of the adoption and passage of the grant, the subject of the injunction; and of the adoption of certain resolutions to disregard the injunction, and reflecting upon the judge who issued it.

Notice of a motion was given for an attachment to issue. The affidavits served were made in the cause.

It may be observed that it has become the very general practice to make an order to show cause why an attachment should not issue in these cases. Notice of a motion for an attachment, with copies of the affidavits served, is undoubtedly also correct. (*Matter of Smethurst*, 2 Sandf. Supr. Ct. Rep. 724; *Bennett vs. James*, in Chancery, cited 1 Hoffman's Ch. Pr. 434, n. 2; *McCreddie vs. Senior*, 4 Paige, 381.)

The fifth section of the statute (2 R. S. 535) is, that the court shall either grant an order for the party to show cause why he should not be punished for the alleged misconduct, or shall issue an attachment to arrest the party and to bring him before such court to answer for such misconduct. Hence the defendant may be brought into court by an attachment in the first instance; and in *Young vs. Garish* (Special Term Superior Court, May, 1854), this was the course pursued. But the almost universal course is to grant an order to show cause or give a notice.

In *Watson vs. Fitzsimmons* (5 Duer, 629) Chief Justice Bosworth adverted to the clause as to showing cause why the party should not be punished for the alleged misconduct, and that the statute had pointed no distinct mode of proceeding under it. The course was therefore such as conformed to the general practice of the court on an order to show cause why relief should not be granted. Section 271 of the Code, subd. 3, authorized a reference in such a case.

Upon hearing the motion in *Davis vs. The Mayor, &c.*, the court disposed of and overruled various objections taken against it; such as that the party proceeded against was not a party to the suit, and because no copy of the affidavit on which the injunction was obtained had been served with the order.

It was held that the party could not set up, as a defence for disobeying the injunction, that the plaintiff had made no case upon his complaint or papers on which an injunction could be sustained. His remedy was to move for a dissolution. *The People vs. Spalding* (2 Paige, 329), *Sullivan vs. Judah* (4 Paige, 446), and *Russell vs. The East Anglican Railway Company* (1 En. L. & Eq. Rep. 101), were cited. A manifest invalidity on the face of the order itself could alone warrant a disobedience.

The conclusion, after examining the various points raised, was, that the order of injunction was a valid exercise of the established jurisdiction of the court, and, the fact of disobedience being made out, that the attachment should be granted.

On the return of the attachment, the parties appeared, and interrogatories were filed on the part of the relators; which the parties were allowed time to answer, and were recognized to appear again at a future day.

Attachments in injunction cases are, by force of the statute, bailable. In *Ferris vs. L'Amoureux*, in Chancery, June 18, 1830, it was ordered in five hundred dollars.

When the party has given bail, the order to file interrogatories, and giving time, usually contains a clause continuing the bond over. This, the Chancellor held, was not essential, where the bond was, as usual, that the party appear and abide by the order of the Court in the premises. The bond then remained in force, as of course.

At this stage of proceedings for a contempt, the title is changed. The interrogatories and all subsequent proceedings are entitled "The People on the relation of —," the party applying. (*Stafford vs. Munn* 4 Paige, 360.) If the party proceeded against has not been bailed, the sheriff who brings him up must detain him until some order is made in the premises (2 R. S. 536; *Lovett vs. Rogers*, 2 Paige, 103), or he may then be bailed. (In the matter of *Vanderbilt*, 4 John. Ch. Rep. 57; *Cary's Reports*, 100); *Hawkins' Pleas of the Crown*, 141. See *Ferris vs. L'Amoureux*, cited 1 Hoffman's Ch. Pr. 435, note.)

In *The People vs. Compton* (*ut supra*) on the day appointed the parties appeared, and answers were put in to many of the interrogatories, and exceptions taken to some others, and a motion was made that those interrogatories be expunged. They involved the question whether any punishment could be inflicted beyond what was necessary to afford redress to the aggrieved party. It was held that the court could punish disobedience to an order as a criminal contempt by fine and imprisonment. The provisions of the Revised Statutes were unrepealed, and governed the case. That was irrespective of any injury done to the party. A fine might be imposed of not over \$250, and punishment by imprisonment added for not over six months, when the disobedience is shown to have been willful.

The exceptions being disposed of, the court decided that the interrogatories should be immediately answered. Answers were read, and the question was argued, what should be the nature and extent of the punishment. The following was the final order:

"At, &c.; present, &c. The People of the State of New York, on the relation of Thomas E. Davis and Cortlandt Palmer, *vs.* O. W. Sturtevant. A writ of attachment having heretofore issued

out of and under the seal of this court, directed to the sheriff, &c., against the above-named O. W. Sturtevant, for contempt in disobeying an injunction granted in the action, pending in this court, of Thomas E. Davis, &c., as plaintiffs, and the Mayor, &c., as defendants ; and the said Sturtevant having been, by virtue of said attachment, attached by said sheriff, and having personally appeared in court ; and interrogatories specifying the facts and circumstances having, by order of the court, been filed, and a copy thereof served on said Sturtevant ; and he having been required to answer, and having answered the same ; and several affidavits and papers touching said contempt having been produced and read ; and counsel as well for the said relators as for the said O. W. S. having been heard :

“It is now here considered and adjudged that the said O. W. S. has been and is guilty of the misconduct alleged against him in the proceedings, and that such misconduct was calculated to, and actually did, defeat, impair, impede, and prejudice the rights and remedies of the said plaintiffs, T. E. D. and C. P., in their said action against The Mayor, &c. ; and that the said T. E. D. and C. P. have, by reason of the said misconduct, been put to a large amount of costs and expenses, to wit, the sum of \$122 20.¹

“And it is further considered and adjudged that the said O. W. S., for his said misconduct, be imprisoned in the common jail of the city and county of New York for the period of fifteen days ; and further, that a fine of \$352 20 be, and the same is hereby, imposed upon the O. W. S. for his said misconduct, and that he stand committed to the common jail of the city and county of New York until the said fine be paid.

“And it is further considered that the sum of \$102 20, part of said fine, be paid over to the said Davis and Palmer, or their attorneys, to satisfy their said costs and expenses in the premises, and that the residue of such fine be paid to the clerk of this court, to be disposed of according to law, and that a warrant issue to carry this judgment into effect.”

Affidavit.—By the 3d section of the act (2 R. S. 537) the court is to be satisfied by due proof, *by affidavit*, of the facts charged,

¹ A reference had been previously ordered to ascertain the costs and expenses. The above sum was the proportion of each party.

and shall cause a copy of such affidavits to be served on the party accused, a reasonable time, to enable him to make his defence.

Bail.—By the 10th section of the statute above referred to, when the attachment is issued by the special order of the court, such court shall direct the penalty in which the defendant shall give bond for his appearance to answer.

And by the 11th section, in all other cases where a party shall be entitled to an attachment without the special order of the court, he shall make application to a judge of the court, who, upon due proof of the facts and circumstances, shall direct the penalty in which the defendant shall give bond for his appearance to answer to the matters alleged against him, and shall indorse such order on the attachment. See, also, sections 12, 13, 14, and 15.

Interrogatories.—By the 19th section of the statute (2 R. S. 537) when any defendant arrested upon an attachment shall have been brought into court, or shall have appeared therein, the court shall cause interrogatories to be filed, specifying the facts and circumstances alleged against the defendant, and requiring his answer thereto, to which the defendant shall make written answers, on oath, within such reasonable time as the court shall allow.

By an order of Lord Clarendon, where the contempt is for the breach of an order, or otherwise, founded on affidavit, the interrogatories shall not be extended to any further matter than what is comprehended in such affidavit or order; and if any other are exhibited, the party examined may demur to them.

In *Livingston vs. Bryant*, before the Chancellor, June 20, 1832 (cited 3 Hoffman's Ch. Pr., p. 117), the first interrogatory inquired whether the party had not received a copy of the injunction, issued in the cause of, &c., and when and whether the paper then shown was not a copy thereof. The other questions were directed to the violations complained of.

In *Young vs. Garish* (Special Term Superior Court, May 26, 1854), Justice Hoffman observed that the interrogatories should not extend to what could not be controverted by the party. Hence, in that instance, those which related to the validity of the judgment and execution were stricken out. See, also, *Brown vs. Andrews* (1 Barb. Sup. Ct. Rep. 228); *Albany City Bank vs. Schermerhorn* (9 Paige, 372).

Proofs.—By the 19th section of the statute (2 R. S. 537) it is also provided that the court may receive any affidavits or other proofs contradictory of the answer of the defendants, or in confirmation thereof; and upon the original affidavits, such answers, and such subsequent proofs, shall determine whether the defendant has been guilty of the conduct alleged.

It was a not uncommon practice in the Court of Chancery to make an order of reference to take proofs; and this was sometimes made to examine the party upon interrogatories, and take such proof as should be produced. (See 1 Hoffman's Ch. Pr. 436, 439, and cases.) By Lord Clarendon's order (Beames' Orders, p. 202), it was directed that where a party prosecuted upon a contempt hath denied it, or the same doth not clearly appear by his examinations, the prosecutor may take out a commission of course to prove the contempt.

In *Cumming vs. Wagoner* (7 Paige Rep. 602), on an attachment returned, a reference was made to a master to examine the defendant on interrogatories, and to take such other proof concerning the alleged contempt, as should be produced by either party, and to report such answers and proofs to the court. The Chancellor adverted to *Stagg vs. Outwater* (cited 1 Hoffman's Practice, Nov. 1834), and observed that a general order to take proofs would not allow the master to receive affidavits; though special circumstances might induce the court to authorize it by an express provision in the order. It was, under the statute, matter of discretion with the court to receive affidavits in confirmation of the answers or to contradict the same.

In *The Mayor, &c., vs. Conover* (5 Abbotts' Rep. 244), a reference was ordered to take proof of the facts constituting the alleged contempt. It does not appear if interrogatories had been first filed and answered.

In *Watson vs. Fitzsimmons* (5 Duer, 629), an order was obtained to show cause why a party should not be punished for his alleged misconduct, for disposing of his property after an injunction-order served. On the return of the order, he denied the contempt, and an order of reference was made to examine the defendant and other witnesses, and take testimony and report the same, and whether the defendant was guilty of the contempt.

On the report coming in, Justice Bosworth observed, "that

the Revised Statutes prescribed two modes of proceeding: one an order to show cause why the defendant should not be punished for an alleged contempt; the other, an attachment to arrest such party, and bring him before the court to answer for the alleged contempt. The statute was silent, when the first mode was adopted, as to the course thereafter to be pursued, whether the defendant appears or fails to appear. It may, therefore, be such as conforms to the general practice of the court on any order to show cause why relief should not be granted.

“Written interrogatories and answers on oath were properly resorted to, though the statute does not in terms require it. (2 Sandf. S. Ct. Rep. 727.) Sect. 271 of the Code, subd. 3, authorized a reference in such a case.”

Judgment of misconduct.—The final order, imposing the fine or imprisonment, must, under section 20, adjudge the defendant guilty of the misconduct alleged, and that such misconduct was calculated to, or actually did, defeat, impair, impede, or prejudice the rights or remedies of the party.

In *McCredie vs. Senior* (4 Paige, 378) it was stated not to be the practice of the court, upon an application for an attachment, to make a final adjudication as to the guilt of the accused. The order should direct the issuing of the attachment, without any other adjudication, or should merely declare that it appears to the court that there is probable cause for issuing an attachment.

See the form of the adjudication in the order in *The People vs. Sturtevant, &c.*, *ante*, p. 380.

The 21st section of the act provides that, if an actual loss or injury shall have been produced to any party by the misconduct alleged, a fine shall be imposed sufficient to indemnify such party, and to satisfy his costs and expenses, which shall be paid over to him on the order of the court. The payment and acceptance of such fine shall be an absolute bar to any action by such aggrieved party to recover damages for such injury or loss.

In *Davis vs. Sturtevant* (4 Duer, 148) an action was brought on a bond given under the 29th section. It was held that reasonable counsel fees might be allowed, as part of the costs and expenses; but the acceptance of the fine which had been imposed was a bar to any further recovery.

There are other provisions of the statute as to contempts, but

none so material in relation to breaches of injunctions as those adverted to. They will be found, with the authorities, in the Books of Practice. See Hoffman's Ch. Pr., vol. 1, p. 435, *et seq.*, and Appendix, vol. 3, pp. 120-122, and especially the proceedings in *Lovett vs. Rogers*; also, Crary's Law and Practice in Special Proceedings, 375, *et seq.*

Although the fact that an injunction ought not to have been allowed is no answer to an attachment for its violation, yet it may be considered in fixing the punishment.¹

¹ *Sullivan vs. Judah* (4 Paige, 444); *Field vs. Hunt* (22 Howard's Pr. Rep. 338).

CHAPTER IV.

ATTACHMENT.

Introductory.—The theory of an attachment or seizure of the property of an alleged debtor, and an interference with his absolute control and possession, during proceedings to establish a demand, seems repugnant to the doctrines of the common law, and an embarrassment to the freedom of commercial transactions. Yet it grew into a custom in the most commercial city of the world, and has obtained a place in the juridical system of the most mercantile communities of the United States. It is found also in foreign codes. (Story's Conflict of Laws, § 549.)

The custom of London is thus defined: "If a plaint be affirmed in London before, &c., against any person, and if it be returned *nihil*, if the plaintiff will surmise that another person within the city, is a debtor to the defendant in any sum, he shall have garnishment (*warning*) against him to warn him to come in and answer whether he is in debt in the manner alleged by the other; and if he comes and does not deny the debt, it shall be attached in his hands; and after four defaults recorded on the part of the defendant, such person shall find new surety to the plaintiff for the said debt; and judgment shall be, that the plaintiff have judgment against him, and that he shall be quit against the other, after execution sued out by the plaintiff." (1 Rolle's Abrid. Customs of London, K. 1, 3, and the other authorities cited in Locke on Attachments, p. 2, n.; Law Library, Vol. 63. The above was certified by Starkey, Recorder of London.)

This custom of London, recognized in the reign of William the Conqueror, is traced to a much remoter antiquity. (Bohun's Privilegia Londini.)

In the case of the Hamborough Comp. (28 Car. 2 Viner's Abrid., vol. 7, p. 226, pl. 16), debt was brought against the Hamborough Company, and they not appearing upon a summons and

nil returned, an attachment was granted, of debts owing to the company in the hands of fourteen several persons. The court said: "We cannot judge of the customs of London; nor do we take upon ourselves to determine whether a debt owing to a corporation be within the custom of foreign attachment or not. This we judge and agree in, that it is not unreasonable that a corporation's debt should be attached. If we had judged the custom unreasonable, we could and would have retained the cause; for we can overrule a custom, though it be one of the customs of London that are confirmed by act of Parliament, if it be against natural reason; but because in this custom we find no such thing, we will return the cause. Let them proceed according to the custom at their peril."

In the case of *Thayer vs. Willett* (Superior Court N. Y., October, 1859), Mr. Noyes referred to the customs of West-Yarmouth, contained in Bloomfield's History of Norfolk, vol. 11, p. 332.

The article as to attachments deserves notice. The custom was ancient in the time of Edward I.

"Of certain usages and customs of the burgh of Yarmouth, observed and kept by the burgesses time immemorial.

"Of the declaration, condemnation, appraisement, disposal, etc., of goods attached.

"The ancient custom of this burgh is, and always hath been, that upon all manner of actions brought within the burgh, attachment shall be made of all manner of goods and chattels, upon pleas of debt, detinue, covenant broken, trespass upon the case, and all other pleas determinable at the common law, at the suit of all manner of plaintiffs, which shall require the same.

"And this attachment shall be made of all such goods and chattels whereof the possession may be lawfully taken and obtained within the burgh, or within the liberties of the same, in this form following, that is to say—[the officers and mode is pointed out]; and that, after attachment made of any manner of goods and chattels as is aforesaid, the same shall remain under the attachment, in the custody and safe keeping of the officers who shall so make the said attachment; which officer then, at the next court following, upon entering of the action or actions, shall present and give in an inventory of all and singular the said goods and chattels into the court, before the bailiffs, there to remain of

record; to the intent that every part and parcel of the said goods may be forthcoming, to satisfy the debt and damages which shall be adjudged by the court, in every such action brought by the said attachment, or else, the plaintiff having no good cause of action, that upon trial thereof, the owners may be restored again to the possession of their said goods and chattels, whereupon said attachments were made.”

“And whereas, divers times, many goods and chattels being attached, are supposed to be the goods and chattels of others, and not of those parties upon whose names the actions are entered in the court as defendants—in those cases, the party or parties which claimeth to have property to those goods and chattels, to defeat the attachment made, and the actions and recoveries had by force thereof, if he be present in the court, shall there, in open court, before the bailiffs, be sworn that the property which he or they so claim in and to the said goods attached, is only upon good cause and consideration, without fraud, covin, or deceit.”

The claimant was then to put in his plea into the court, that the goods did belong to him. Upon which plea, if the party attaching joined issue, a jury was to be then returned and impaneled, “upon their oaths, to inquire and try the property aforesaid, according to the proofs on either part. And if it be found by the verdict of the said jury, that the property of the said goods, at the time of the attachment made, was in him or them so claiming the same, according to his or their plea, put into the court, then those goods and chattels shall be released of those attachments, and re-delivered up to him or them, that be so found to be the right owners thereof.” “And if it be found by the verdict of the said jury, that the property of the said goods and chattels attached, at the time of the attachment made, was in him or them, supposed to be defendants in the action or actions brought and entered upon the said attachments—and not in him or them so making claim thereto—that then those goods and chattels so attached, shall remain liable for the satisfaction of the debt and damages of the plaintiff which caused the said attachment to be made.”

“Also, by the custom of this burgh, all attachments of goods and chattels whatsoever, by virtue of any action made as aforesaid, shall, upon recognizance of two freemen of this burgh, ac-

knowledge before the bailiffs, or one of them, to become sureties and pledges to those actions presently before the fourth default, entered against those goods, be released and discharged; and the said pledges shall be recorded in court, to be answerable to the said attachments, whereupon the said actions were made; but after the fourth default entered, no sureties shall be received."

A branch of the committee of the House of Commons, upon municipal corporations, appointed in 1834, reported upon the subject of foreign attachments, as follows:

"A difference of opinion prevails among mercantile men with respect to the utility of this proceeding. On the one side, it is said to be important in a commercial community, to apply the property of an absent debtor, wheresoever it may be found, to the payment of his creditor; and this, it is contended, is particularly advantageous in a city much frequented by foreigners for the purposes of trade, who may contract debts during their abode in England, and then remove themselves to foreign parts, beyond the reach of personal process.

"On the other hand, it is supposed to embarrass commercial operations, in consequence of the unusual power which it places in the hands of creditors, by enabling them suddenly to lay an embargo on the goods of their debtors, which cannot be applied in discharge of any commercial engagements with third persons, until the attachment is removed."

The committee proceed to discuss these objections and views, and conclude: "The alleged objections do not therefore appear to be so formidable as has been represented; but the advantage of a speedy and safe mode of recovering debts is obvious." (Cited Locke on Attachments, p. 20.)

Among the customs of Paris,¹ we find the following in the definition of *Seisin*:

"It is taken also for the seizure of effects in the hands of a third party belonging or due to the debtor of him who makes the seizure, and the seizure in this case is termed arrest; because it only arrests what is due to the debtor, until such time as the party seizing shall have obtained by sentence, that the effects shall be put in his hands for, and as a deduction from, what his

¹ Edition 1770, Paris.

debtor owes him; so that, in this case, seizure and arrest are synonymous."

The derivation of the word, according to Ch. J. Hosmer, is remotely from the Latin word *attinger*, and more immediately from the French "*attacher*"; and signifies, to take or touch, and was adopted as a precise expression of the thing: *nam qui nomina intelligit, res etiam intelligit.*¹

The system was adopted in our State at least as early as 1786. By an act of April 4, 1786,² provision was made, not only for the case of a debtor secretly departing from the State, or keeping concealed within the same, but by the 21st section it was enacted as follows: "And whereas persons who dwell out of this State may be indebted within the same, and have estate or effects within the same sufficient to satisfy such debts or parts thereof; therefore, be it enacted, that the estate, goods, chattels, and effects, real and personal, of all and every such person and persons (so indebted) as do or may dwell or reside out of this State, shall also be liable to be taken, seized, proceeded against, sold, conveyed, and disposed of, for the payment and satisfaction of such of the said debts aforesaid, as near as may be, in like manner as the estate and effects of other debtors in and by this act are made subject and liable to."

There was a provision that the proof of non-residence must be made to the satisfaction of the judge, by two witnesses.

By the act of 21st of March, 1801, similar provisions were made, both as to absconding and non-resident debtors.³ This act is found in the Revision of 1813,⁴ and continued in force, with some additions and modifications, until the Revision of 1830.⁵ The whole law was then embodied and amended. Various amendments were introduced by subsequent statutes, and are to be found in the fifth edition of the Statutes, vol. 3, p. 78, &c. *

In all this legislation, the great principle is contained, that the attachment was like proceedings in bankruptcy, sequestering and applying the debtor's estate for the creditors at large, and for them equally.

But the Code of New York, adopted in 1848, has provided a

¹ Hollister vs. Goodale, 8 Conn. Rep. 332.

² Greenleaf, vol. 1, p. 214.

³ 1 Webster & Skinner, p. 236.

⁴ 2 R. L. 1813, p. 157.

⁵ 2 R. S. 1830, p. 1.

remedy for the sole benefit of a plaintiff in an action, a provisional sequestration of property under certain circumstances, to secure payment of the demand in question, if it should be established by judgment. It is strictly analogous to the proceeding of the custom of London. Its provisions are now to be stated.

Section 227.

Cases for an Attachment.

“Property of foreign corporations, and of non-resident, or absconding, or concealed defendants, may be attached—

“(1) In an action for the recovery of [the] money (2) against a corporation created by or under the laws of any other State, government, or country, (3) or against a defendant who is not a resident of this State, or (4) against a defendant who has absconded or concealed himself, or (5) whenever any person or corporation is about to remove any of his or its property from this State, or (6) has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete, any of his or its property with intent to defraud creditors, as hereinafter mentioned—the plaintiff, at the time of issuing the summons, or at any time afterwards, may have the property of such defendant *or corporation* attached, in the manner hereinafter prescribed, as a security for the satisfaction of such judgment as the plaintiff may recover.”

This chapter respecting attachments was first enacted in the Code of April 11, 1849. In that of 1848, there were four chapters: Arrest and Bail, Claim and Delivery, Injunction, and other Provisional Remedies, the latter corresponding with the present fifth chapter.

This 227th section, as passed in 1849, remained unchanged until 1857. By the amendment which went into effect on the 7th May of that year, additions were made, which are found in the subdivisions above marked 5 and 6, and adding the words “or corporation,” italicized, near the end of the section.

Remedy under Revised Statutes.—The Revised Statutes had provided a remedy by attachment, but of a nature essentially dif-

ferent in several particulars from this prescribed by the Code. The writ was the commencement of an action against debtors who could not be served. It was original process. It was issued by a judge or officer specially empowered, not by a court. It enured to the benefit of all who should come in as creditors by petition.¹

The attachment under the Code is not a process for the commencement of an action. It is an order in an action for the arrest of the debtor's property, in the nature of bail for the payment of such judgment as the plaintiff may obtain; and it may issue at the commencement of the action, or at any time afterwards.²

Justice Paige, in *Furman vs. Walters* (13 Howard's Pr. Rep. 350), notes the distinction. "The attachments under the Revised Statutes are special proceedings; are the original process by which suits are commenced. An attachment under the Code is not original process, and by it a suit is not commenced, nor upon it alone can a judgment be obtained. It is a provisional remedy adopted in a suit already commenced."

And Justice James, in *Houghton vs. Ault* (16 Howard, 79), observes: "Under the Code an attachment is not a process for the commencement of an action. It is an order in the action for the arrest of the debtor's property in the nature of bail for the payment of such judgment as the plaintiff may recover. It may issue at the commencement of the action, or at any time afterwards. In these respects it is entirely unlike the attachment provided by the Revised Statutes, that being the commencement of a proceeding instituted and conducted out of court, before an officer who derived his power in the matter from the statutes."

The remedy by the Code has not abrogated the course of proceedings under the Revised Statutes, as to either foreign corporations, or absent, concealed, or absconding debtors.³

Party entitled to the warrant.—The Code, unlike the Revised Statutes, has not defined who may sustain an attachment. As this writ is an adjunct to an action, it may be safely stated, that whoever can support that kind of action in which an attachment

¹ 2 R. S. 2, § 1, &c.

² *Houghton vs. Ault*, 16 Howard, 79.

³ *Renard vs. Hargous*, 2 Duer, 540. On appeal, 3 Kernan, 259.

may issue, in the particular court in which the action is brought, against the defendant, can have this remedy in it.

Under the former statutes as embodied in the Revision of 1830, and amended in 1845,¹ the plaintiff, though a non-resident, might obtain an attachment, if the demand, whether liquidated or not, arose upon contract, or upon a judgment or decree rendered within this State, or upon a judgment or decree rendered elsewhere upon a contract made within the State.²

The partial incapacity which thus attached to a non-resident plaintiff to resort to this remedy under the statutes, does not exist under the Code. A non-resident individual, or a foreign corporation, can have the remedy, whenever he or it can sue the defendant.

And hence, in *Ready vs. Stewart* (1 Code Rep., N. S. 297), it was held at Special Term, in the First District, that a non-resident plaintiff may have the warrant against a non-resident defendant, although the cause of action arose elsewhere. Although the judgment founded on a publication might be inoperative as to the person of the defendant, yet his property could be attached.

Nature of the action.—The action must be one for recovery of the money. The word *the* appears to be inserted through some error. The authorities seem to determine, that whether an action is for the recovery of money or not, is to be tested by the summons—asking under the first subdivision of section 129 for payment of money—and by the complaint, showing that judgment for payment of money will be the judgment to be given, and nothing more. The Code does not require that the contract shall be one, stipulating by its terms for the payment of money; but only, that the action should be one arising on contract, and that only money is sought to be recovered. It is enough if, by reason of a contract, the defendant is liable to pay, and the plaintiff entitled to demand, a sum of money.³

The phrase “for the recovery of money only,” is used in the first subdivision of section 129, as to what shall be inserted in the summons. The phrase “the recovery of money,” is used in the 141st section, subdivision 3, concerning the demand of relief to

¹ Laws of 1845, ch. 153.

² In *The Matter of Brown*, 21 Wendell, 316, &c.

³ *Crowden vs. Drew*, 3 Duer, 652.

be contained in a complaint. The complaint must state the amount, the recovery of which is demanded.

In *West vs. Brewster* (1 Duer, 647) the complaint made a case of the reception of moneys by an attorney; asked for an account, and judgment for the sum which should be found due. The summons was for relief. It was held not to be an action for the recovery of money only under section 129.

The affidavit under section 229 is to specify the amount of the claim; and under section 231, property sufficient to satisfy the plaintiff's demand is to be taken.

In *Ward vs. Begg* (18 Barbour, 139) the head-note is: "In order to justify the issuing of an attachment under the Code, it is not necessary that the plaintiff should have a cause of action for the payment of money merely. It is enough that a cause of action exists against the defendant, and that the amount of the claim, and the grounds thereof, are stated."

But the summons in that case was for the recovery of money, and the affidavit showed a debt arising from a sale of goods, and a liability of the plaintiffs, as guarantors for the defendant, to third persons for a definite sum.

In consideration of this, the defendant had agreed to consign fish to the plaintiffs. Neither the debt for the goods sold, nor the debt guaranteed, had yet become due. The defendant was responsible for the breach of his contract to send fish, and was liable to be sued for it as soon as broken; and the amount of the claim was the debt payable and the amount of the guaranty.

The clause of the 227th section, now discussed, was not referred to; but it would seem that the case was within its just construction.

The phraseology of the Revised Statutes was, "a debtor, indebted on contract," "a demand against such debtor personally, whether liquidated or not, arising on contract." The affidavit was to specify the sum in which the debtor was indebted.

In *Lenox vs. Howland* (3 Caines, 323), it was held, upon similar language in the former statute, that although the creditor is to swear that the party is indebted to him in the sum of one hundred dollars or upwards, it does not follow that the demand is to be so certain as to fall within the technical definition of a debt, or as to be susceptible of liquidation without the intervention of

a jury. *Being indebted* is equivalent to *owing*; it is sufficient, therefore, if the demand arise on contract. The action was founded on contract, contained in a bill of lading for the delivery of goods shipped on board of the defendant's vessel. It was an uncertain, but a plain money demand.

A variety of cases, interpreting similar provisions in the laws of other States, are stated by Mr. Drake in his learned work on attachments.¹ Among them that of *Wilson vs. Wilson* (8 Gill's Rep. 192) may be usefully referred to. It contains the doctrine that where a contract sued upon furnished a standard by which the amount due could be so clearly ascertained, as to enable the plaintiff to aver it in his affidavit, or the jury by their verdict to find it, an attachment might issue.

It is presumed that the particular character of our system precludes an attachment upon a debt, which though undoubted has not yet become payable. In some States this may be done.²

In England the rule is thus stated: "An attachment will only lie where the defendant could maintain an action of debt or detinue in the Mayor's Court, or an action of debt, detinue, assumpsit, or trover in the Superior Courts against the garnishee, for the recovery of the debt or goods sought to be attached. In fact, the plaintiff, at the trial of the attachment has to prove the case of the defendant against the garnishee."³

No demand can support an attachment which rests upon any contingency to determine whether it will ever be due or not. An accommodation acceptor cannot have it before the maturity of the bill; and his payment afterwards will not so retroact as to sustain one issued before.⁴

The complaint in an action alleged a partnership and dissolution, an assignment to the defendant upon an agreement to pay the debts and divide the surplus; then alleged that there was a surplus, but the amount the plaintiff was unable to state, and demanded an account. An affidavit was afterwards made, stating that there was due to the plaintiff the sum of \$22,000. The averments were similar to those of the complaint. An attachment had been obtained.

¹ Sections 50 and 60.

² Drake on Attachment, section 58.

³ Locke on Attachments, p. 27.

⁴ Read vs. Ware, 2 Louis. Ann. Rep. 498; Black vs. Zacharie, 3 Howard's Sup. Court Rep. U. S. 483.

Upon a motion to discharge it, Mr. Justice Leonard pointed out the inconsistency between the complaint and affidavit. The former must be true. The amount could not be known without an accounting. The party's opinion or belief was not enough. He had not seen any statement of the condition of the affairs. The attachment was vacated. (*Ackroyd vs. Ackroyd*, Supreme Court Chambers, Nov. 1860.)

Against a foreign Corporation.—The attachment may issue against a corporation created by or under the laws of any other State government or country.

It is of importance to connect the 427th section of the Code with this provision: "An action against a corporation created by or under the laws of any other State, government, or country, may be brought in the Supreme Court, the Superior Court of the city of New York, or the Court of Common Pleas of the city and county of New York, by a resident of the State for any cause of action; and by a non-resident plaintiff, when the cause of action has arisen, or the subject of the action is situated within this State."

The mode of commencing such an action is pointed out in the 134th section, and the act of 1855, ch. 279. The summons may be served upon the president or other head of the corporation, &c., but such service could, before the amendment of 1859, be made in respect to a foreign corporation only, when it has property within the State, or the cause of action arose therein. So by section 135, service by publication may be made, where the defendant is a foreign corporation, has property within the State, or the cause of action arose therein.

In *Doty vs. The Michigan Central Railroad Co.* (Special Term Superior Court, May, 1859, 8 Abbotts' Rep. 427, before Woodruff, Justice), the defendant was a foreign corporation, and the plaintiff was a resident of this State. It did not appear that the defendants had property, or that the cause of action arose in this State. The complaint and summons had been served on one *Clark* within the city. Clark was not the president or other head of the corporation, nor its secretary, cashier, treasurer, or director, or managing agent. He received and paid out money for them; his name was printed as agent on tickets and circulars issued by them in the city. They had not designated any person within

the State on whom process could be served under the act of 1855.¹

It was held that the service on Clark did not warrant the entry of a judgment against the defendants, and one taken by default was set aside. The service had been made in 1850.

The amendment of April, 1859, to the 134th section is important. It appears to sanction the service of a summons, when it can be made within the State, personally, on the president, or treasurer, or secretary, in every case against a foreign corporation, whether the cause of action arose within the State, or the corporation has property within it, or not. If a particular court has jurisdiction of the subject-matter, it may in this manner get jurisdiction over a foreign corporation, and thus issue an attachment.

In *Chamberlain vs. The New Orleans and Salem Railroad Co.* (Special Term, February, 1856, Superior Court of New York, Hoffman, Justice), it was observed, that all the provisions of the Code upon the subject appear to imply that the action to which this process is subservient, must be one which can be sustained in the particular court out of which it issues. Such was the construction before the 427th section of the Code was adopted. (*Fisher vs. Curtis*, and other cases, 2 Sandf. Supr. Ct. Rep. 610.) It was held that a non-resident plaintiff could not sustain an attachment, in an action brought here, on a judgment recovered in Ohio, against the defendants, a foreign corporation.

In *The Western Bank vs. The City Bank of Columbus* (7 Howard, 238), both plaintiffs and defendants were foreign corporations. The plaintiffs lent the defendants \$10,000, for which a bill of exchange was given, drawn upon a resident of New York. It was held that a foreign corporation could not sue another foreign corporation under the Revised Statutes. (2 R. S. 457, § 1.) It was not a resident, and could not be placed on a better footing than a non-resident individual. It was also held that the cause of action did not arise here. An attachment was discharged.

In *Cantwell vs. The Dubuque R. R. Co.* (17 Howard's Pr. Rep. 16) the plaintiff resided in Ohio, and the defendant was a foreign corporation created by the laws of *Iowa*. The action was upon a promissory note, made at the defendant's office in

¹ Ch. 279, p. 470, §§ 1 and 3, Session Laws, 1855.

Iowa, payable at the Metropolitan Bank in New York. It was held that, as the plaintiff was a non-resident, the origin of the cause of action must govern the case; and that arose in Iowa, where the contract was made; and an attachment was discharged.

The history of this process in our State is thus stated in *McDonough vs. Phelps*:¹ "The system of proceeding against a foreign corporation originated, in this State, in the Revised Statutes of 1830. The 15th, and several subsequent sections, gave the right to sue, and prescribed the mode (2 R. S. 459). The revisers refer to *McQueen vs. The Middletown Company* (16 John. Rep. 5) as deciding that an attachment would not lie against a foreign corporation, under the absent debtor act, and to a decision in Chancery, affirmed on appeal, that that court had no jurisdiction to attach its property.

"The protection of our citizens required that some provision should be made to render such corporations amenable to our laws, and in our own courts. The sections had been drawn in analogy to the act as to attachments against absent and absconding debtors. Accordingly, the whole theory of those provisions was one of a process against property found in the State. But there was nothing preventing the Legislature from enacting that suits may be commenced in any other mode, which will operate upon foreign corporations, as much as upon individuals who are foreigners. Accordingly, section 134 of the Code has provided for the service of a summons upon a president, directors, &c., and other sections regulate the course of proceeding against them."

It may be useful here to notice the various statutes passed upon this subject of proceedings against foreign corporations: the Revised Statutes of 1830 (2 R. S. 461, § 30, &c.); Laws of 1840, ch. 354; Laws of 1842, ch. 197; Laws of 1845, ch. 234; Laws of 1848, ch. 53; Code, § 134, as amended in 1859, and Code, § 471, as to the force of statutory provisions, where not inconsistent with the Code.

A debt due by a foreign corporation to a non-resident debtor upon a contract made out of the State, is not the subject of an attachment.

Thus, in *Willett vs. The Equitable Ins. Co.* (10 Abbott, 193), the defendant was a foreign insurance company, and the plaintiff,

¹ 15 Howard's Pr. Rep. 376, Hoffman, Justice.

as sheriff, had attached a debt which it owed to Cook & Barton, residents of another State, on a policy of insurance, in an action by one Appleton. The present suit was brought to reduce the debt into possession. A copy of the attachment was left with the agent of the company, but such agent was only temporarily here. There was no agency established in the State of New York. It was held that the debt was not property, or a debt within this State, so as to be reached by an attachment; and the complaint was dismissed.

Against a non-resident.—An attachment may issue against a defendant who is not a resident of this State. The provision of the Revised Statutes of 1830 was, that the real and personal property of a debtor might be attached, whenever any person, not being a resident of this State, shall be indebted on a contract made within this State, or to a creditor residing within this State, although upon a contract made elsewhere.

Under the last clause of this provision, the cases of *The People vs. Griffith* (Lalor's Supp. to Denio & Hill, 447), of *Staples vs. Fairbanks* (3 Comst. 41), and *Payne vs. Young* (4 Selden, 158), show the necessity of an explicit allegation in the papers of the residence of the plaintiff being within the State. The description of the parties being of the city of New York, was held insufficient.

But, as a non-resident may have the writ where he can sustain the action, this may not be so necessary, under the Code, except when the action is against a foreign corporation.

The following are leading cases, determining what constitutes a defendant a non-resident of this State, within the sense of the Code: *Lee vs. Stanley* (9 Howard's Pr. Rep. 272); *Houghton vs. Ault* (16 Howard, 77); *Chaine vs. Wilson* (ibid. 552; 8 Abbott, 78); *Greaton vs. Morgan* (ibid. 64). They contain references to many others of the most importance.

In *Lee vs. Stanley*, the defendant kept a house in Bradford, New Hampshire, where his wife and family resided, in which he entertained his friends, and which was called his house. He had a store of goods and was doing business in Franklin County in this State. He appeared to have divided his time about equally between these two and a third place. An attachment was sustained.

In *Houghton vs. Ault*, the defendant had a family residing at Portsmouth, Canada, and there owned a ship-yard. He leased a marine railway at Ogdensburgh; began business there, and carried it on until the issuing of the attachment in December, 1857. During that period he was most of his time at Ogdensburgh—his family keeping house at Portsmouth. He continued to do work also at the latter place, where he had property to a considerable amount. It was held that his legal residence was in Canada, and a motion to discharge an attachment was denied.

In *Barry vs. Bockover*,¹ there was a motion to discharge an attachment. The defendant was a member of a firm doing business in New York since 1854. He spent the whole of every business day in New York, with the exception of occasional absences from sickness, or on business of the firm. All his working capital was invested in New York, where his individual bank account, as well as that of his firm, was kept. He had spent eight hours of every business day in the city. Process could have been served upon him, and was actually served upon him at his store. His family, however, resided in Jersey City, in a house hired by him, and he slept there every night, with occasional absences, and remained there regularly from Saturday night to Monday morning. He owned no real estate in New Jersey. It was held that he was a non-resident, and the attachment was sustained.

The facts in the case of *Chaine vs. Wilson*² are numerous and complicated. The following is a summary of those which are material, as they are found in the opinions of the judges, both at Special and General Term :

The defendant was confessedly a resident of Norwalk, in the State of Connecticut, down to about August, 1856. From that period until the fall of 1857, he left his family in Norwalk, on the farm theretofore occupied by them; spending, as a general rule, Sunday there; returning to New York on Monday; usually remaining there until Saturday, but sometimes going to Norwalk on Wednesday, and returning on Thursday. While in New York he occupied a room, as an ordinary guest, at a public hotel.

¹ 6 Abbotts' Rep. 374, Superior Court, General Term.

² Special Term, Superior Court, 16 Howard, 552; 8 Abbott, 78; General Term, 1 Bosworth, 673.

In the fall (October) of 1857 he brought his wife and child to the city ; took rooms at a hotel ; occupied them for about three months, paying his bills weekly, when he gave them up, and went to Norwalk. This was about January, 1858. There was no evidence of his being in New York for a day until the latter end of May. For the most of the time he was sick.

His wife and child spent a few days at a hotel in New York during March, 1858, occupying a room as transient guests.

He had been advised, upon the embarrassment of his firm arising in the fall of 1857, to make New York unequivocally his residence, from the risk of attachments. He conveyed his farm to his son, and the deed was recorded when he became embarrassed. But the farm had been open to his and family's use as much as it had ever been. :

There are several other, but less important, matters stated in the affidavits and noticed in the opinions. It is not thought necessary to detail them. The foregoing statement comprises the main facts on which the decision proceeded.

Attachments issued from the 13th of April to the 1st of July, 1858, were sustained.

The following are extracts from the opinions of Justice Hoffman at Special, and Justice Woodruff at General Term :

Justice Hoffman said : " These facts present two striking points : *First*. Of a clear case of domicile and residence at Norwalk down to the fall of 1857 ; and, *next*, that at the time of issuing two of the attachments there was no actual residence in this city, and had not been for about four months ; but an actual residence in Norwalk, without the least connection with a residence in New York, by ownership of, or hiring a house, or even a room within it.

• " The character of the residence, from October, 1857, to January, 1858, may, perhaps, present a very different case from that which will arise upon the facts subsequently, and might have exempted the defendant from the provisions of the attachment law. But, from January to the end of May, he had entirely detached himself from every semblance of residence in New York, and had resumed his former domicile and dwelling. A more difficult question may be in relation to the other three attachments, sued out when he was in the actual occupation of a room in the

hotel—had been so for over a month—and continued so for some time afterwards, with occasional absences.

“It is to my mind clear that his domicile, for the purposes of succession, testacy, or intestacy, liability to taxation, and enjoyment of the privilege of voting, continued through the whole period, and was, at the date of each of the attachments, in Norwalk.

“The opinion of the Master of the Rolls, in *Sommerville vs. Sommerville* (5 Vesey R. 786), is as sure a guide upon this question as can be found.

“The domicile established upon the facts in the present case is like the domicile of origin constituted there, ‘and it is to prevail until the party has not only acquired another, but has manifested and carried into execution an intention of abandoning his former domicile, and taking another as his sole domicile.’

“So, Lord Cottenham says, in *Munro vs. Munro* (7 Clark & Fin. Rep. 77): ‘To effect the abandonment of the domicile of origin, and substitute another in its place, is required, *le concours de la volonté et du fait—animus et facto*; that is, the choice of a place, actual residence in the place then chosen, and that it should be the principal and permanent residence.’

“The case of *Somerville vs. Anderson* (22 Eng. Law & Eq. Rep. 614, and before the Privy Council, 29 id. 59) applied the same rules to a domicile of choice as are applicable to one of origin. The party had lost his origin of birth by residence in England, with intention to abide there; and was held to have lost the latter domicile, from a residence in France—keeping house for thirteen years there—with only occasional absences; and to have acquired one in France. He broke up entirely his English establishment upon removing to France.

“In *Evins vs. Smith* (14 Howard U. S. S. C. Rep. 400; Curtis, Ed., vol. 20, p. 252), Justice Wayne, delivering the opinion of the court, says: ‘It is difficult to lay down any rule under which every instance of residence could be brought, which may make a domicile of choice. But there must be, to constitute it, actual residence within the place, with the intention that it is to be a principal and permanent residence.’

“And we find it laid down that the domicile of a married man is the place of the habitual dwelling of the husband’s family, al-

though he may be conducting business elsewhere. (Phillimore on Domicil, § 209, &c. ; Story's Conflict of Laws, p. 57 ; Catlin *vs.* Gladding, 4 Mason's Rep. ; see, also, the elaborate opinion of Surrogate Bradford, in Isham *vs.* Gebbins, 1 Bradford's Rep. 69.)

"It is not to be denied that domicil may exist independently of habitation, using that term as denoting merely actual abiding within a place. But contemplated habitation or rehabilitation is also an element in the legal idea of domicil, when actual habitation does not exist. The dwelling in one place, which is thus consistent with a continued domicil in another, is, under certain circumstances, called a commercial domicil—the residence *negotiorum ratione* of the civil law. (Voet on the Pandects, B. 5, Tit. 1, § 98 ; Drake on Attachments, § 67.)

"In *Payne vs. Taylor* (10th Louisiana Rep. 726), the suit was commenced by attachment of the property of David Taylor, as a resident of Massachusetts. He had for several years before been dwelling in New Orleans, and doing commercial business there under the name of D. Taylor & Co. In support of a motion to discharge an attachment, it was urged that his long commercial domicil made him a resident of New Orleans, where he could always be served with process. But the motion was denied. The phrase in the Code of Louisiana is nearly the same as in our own. (See, also, *Bryan vs. Diarse*, 1 Martin's Louisiana Rep. 412, new series.)

"*Jackson vs. Perry* (13 Bal. Moor. 211) is a valuable case to the point, that the ability to serve process upon a party from finding him within the State, is not the basis of an attachment law against the property of non-residents.

"It must be admitted that several cases have countenanced the doctrine that, under the attachment law before the Code, the question depends upon the fact of a mere abiding in a place for some continuance of time, wholly irrespective of the true domicil. (In the matter of *Thompson*, 1 Wend. R. 45 ; *Haggart vs. Morgan*, 4 Sandf. Rep. 198, and 1 Selden R. 422 ; *Bartlett vs. The City of New York*, 5 Sand. R. 46.) A very able, and to my mind satisfactory view of these cases, is to be found in the opinion of Justice James in *Houghton vs. Ault* (16 Howard R. 78).

"That examination is, I think, sufficient to show that those cases (even that of *Haggart vs. Morgan*, in the Court of Appeals), as it

did not control the case before the learned judge, could not govern the present one. Still, the last-mentioned case, although the decision was upon the ground of the execution of the bond having concluded the party, may, perhaps, be treated as deciding that an absence of three years from an acknowledged domicile, and dwelling for that period in another place for business purposes, makes the party a non-resident of the first place within the statute.

“It would be difficult to contest the truth of the converse of this decision, and to avoid holding that, if a party was dwelling habitually in New York for the same period, and solely for business purposes, he would be deemed a resident of New York, although his domicile was clearly elsewhere. But the principle of these cases opens the question of the nature, object, and duration of absence or dwelling which is to control each particular case. It would not be pretended that the dwelling for a week for a special purpose in New York made a party a resident, whose fixed habitation or domicile was elsewhere. So, we perceive, that if the domicile does not supply a decisive rule, neither does the mere abiding within the place at the time of the service of the writ furnish it; and thus each case must be left to the operation of all the rules usually applied to determine similar questions.

“When this is conceded, then the case is open to the important consideration urged by Mr. Justice James, that the attachment under the Code differs from that under the Revised Statutes, in this, ‘that it is not a process for the commencement of an action, but is an arrest of the party’s property in the nature of bail, for the payment of such judgment as he may obtain.’”

Justice Hoffman then cited and examined the cases of *Houghton vs. Ault*; *Lee vs. Stanley* (9 Howard’s Pr. Rep. 272); and *Barry vs. Bockover* (6 Abbott, 374), and proceeded:

“These cases appear to me to have restored the criterion of domicile to a strong, if not controlling influence upon these questions under the Code. Indeed, they decide little more than is contained in the early case of *Fitzgerald* (2 Caines, 318).

“The law of domicile has sprung from the Civil Code, and we may with advantage resort to the exposition of that law upon the subject. The statement of its rule generally found in Treatises and Decisions is, *ubi quis larem ac fortunarum suarum summam constituit*. The residue of the passage is, *Unde rursus non sit*

discessurus si nihil avocet; unde cum profectus est, peregrinari videtur; quo si rediit, peregrinari jam destitit. (Domat., vol. 2, p. 484.)

“What is the meaning of the word *larem* in this definition? Lord Rosslyn in the Douglass case (see 5 Vesey Rep. 758), adverts to an expression in one of the letters in evidence, that the writer did not mean to set up his *tabernacle* in Scotland, and speaks of this phrase as a fair interpretation of the word *larem*. If we look to its signification in writers of acknowledged authority, it will be found mainly to designate either the tutelary deity of the hearth, or the only home of the family.¹

“In either sense, Norwalk constituted the *larem* of the defendant. So all that we can gather from the papers before us, as to the mass of his fortune (*summan fortunarum*), indicates the possession of a homestead in Norwalk, while his floating capital was in New York, in the midst of agitation and peril. In the fall of 1857, ‘his commercial embarrassments began,’ and we may infer from the result, that such capital was inadequate to meet his debts. Then it was that the deed of the homestead to his son was recorded, and then the advice to remove his family to New York was given and acted upon.

“I do not think that this subject can be properly treated without adverting to the important decisions in Admiralty respecting the residence of a citizen in an enemy’s country, to subject his property to seizure and condemnation in time of war. The authorities before Sir William Scott, are all cited and commented upon in the great case of *The Venus* (8 Cranch R. 253), in the opinions of Justice Washington and Chief Justice Marshall.

“It is sufficient for me to say, that the governing rule was admitted to be the removing from an established domicil, with

¹ *Dii penates meum parentum familiæque Lar pater, vobis mando; meum parentum rem bene ut tutemini; ego mihi, alios deos penates persequar, alium Larem.* (Plautus.) *Laribus in foco, penatralibus, in atrio, aut interiore ædium parte sacra fiebant.* (Ibid.) *Omnium ædium ac familiarum dii erant, iisque focus peculiariter sacer erat.* (Forcellini Lexicon in verbo.)

Illos binas, aut amplius domos continuare nobis larum familiarum nusquam ullum esse. (Sallust.)

The definition of *Domicilium*, in the dictionary of Forcellini ex cura Facciolati is, *Domus, Ædes, Domestica Habitatio.* (In verbo.)

the intention of making a permanent settlement, or for an indefinite time elsewhere. With such an intention the right of the domicile might be acquired upon a residence of even a few days. It was admitted in the case, that the claimants had acquired a right of domicile in Great Britain at the time of the breaking out of the war; and thus the question was, what was the consequence of the capture of such a person's property on the high seas?

"I think that upon the application of the leading principles and cases I have thus referred to, the legal conclusion is, that the defendant, Wilson, was not a resident of New York at the date of these attachments. Through all the periods of his business prosperity, we find his domestic hearth and his household comforts at Norwalk; his hopes of the enjoyment of the fruits of his labor were there concentrated; and in adversity he turns instinctively to the same place for respite and repose. It is only when the struggle with hostile fortune had begun, and the apprehension arose that his property would be swept away from the purposes to which he might wish to destine it, that he brought his family to reside temporarily in New York. It is impossible, I think, to look upon him as more than a sojourner in this city—with no intention of remaining there fixedly, but with an intention, in all the vicissitudes of his business and of life, of finding his permanent home at Norwalk."

Mr. Justice Woodruff, in delivering the opinion of the court, at General Term, stated the case of *Barry vs. Boekover* (General Term, Superior Court, April, 1858), and said:

"It is, therefore, to be deemed settled in this court, that the right of a plaintiff to have the property of a defendant attached, on the ground of his non-residence, does not depend upon the question whether the defendant can be served with the summons in the action. Also, that the carrying on of a mercantile business in this city, and staying within our limits for the purposes of business, during all the hours usually devoted to business here, do not alone constitute residence within the meaning of the statute. And it follows, as a necessary consequence of this proposition, that whether a man's absence from his family be for eight hours in each day, or six days in each week, if he has a family living in a neighboring State, for whom he provides, to whom he resorts for comfort, relaxation, and repose, and with whom he abides

whenever the immediate demands of his business upon his attention will permit—whenever sickness disables him from conducting that business—and when those days successively return on which business ceases, and man rests from labor—he resides in such neighboring State, where (in every proper sense, as understood no less by those learned in the law, than by the common intelligence of every-day life) is his home.”

“Ordinarily, one’s residence and domicile (if they do not always mean the same thing) are in fact the same; and where they so concur, they are that place which we all mean when we speak of one’s *home*.”

The learned judge proceeded to a critical examination of the affidavits, and concluded that there was no sufficient ground for holding that the conclusion of the judge at Special Term, that Wilson’s residence was in Connecticut, was wrong. On the contrary, that sitting as jurors, and acting under proper instructions touching the law, the court inclined to think they would have come to the same result.

Defendants jointly liable.—There are several authorities to show that, where the action is against several jointly liable, and one is a non-resident, and the others resident, an attachment may be allowed, and the joint property taken.

In — *vs.* — (1 Duer Rep. 662) the action was against two defendants jointly liable upon a contract. The summons had been personally served upon one. The other was a non-resident, and a warrant of attachment was allowed.

In *Brewster vs. Honingsburgers* (2 Code Rep. 50, at Special Term, Supreme Court), Justice Hurlbut held, where one of several joint promisors on a note was a non-resident, and the others residents, an attachment might issue, and partnership property be taken.

So, in *Baird vs. Walker and others* (12 Barb. 298), the action was upon a bond given upon an attachment against Walker, one of a firm which became indebted to the plaintiff. Walker was a non-resident, and Hurlbut, the other partner, a resident. It was held that the attachment was valid, and the action on the bond could be sustained.

These cases were followed in a case at Special Term of the

Superior Court.¹ The action was for rent on a lease to three defendants jointly, who were partners in trade, one of them being a non-resident. An attachment was issued, and the partnership property taken.

It may be suggested whether this rule does not tend to needless expense and trouble, where there is no question as to the responsibility of the resident defendants, or of the firm.

In a case before Ch. Justice Bosworth, of the Superior Court, April, 1861, the summons had been served upon one only of several partners, who was a resident, and the others being non-residents; an attachment issued, and partnership goods were then taken. An assignment was then made of partnership property, including the goods so taken. The assignee brought an action for an injunction and receiver, to prevent the money, the proceeds of the goods, going to the attaching creditor. Judgment had been obtained, and the goods sold. It was insisted, on behalf of the plaintiffs, that nothing was affected by the attachment but the resulting interest of the absent partner, after all the debts were paid, and his own account with the firm adjusted. The attaching creditors being of undoubted responsibility and parties to the action, the Chief Justice refused to interfere.

Foreign monarch or state.—A singular case is mentioned by Mr. Locke,² in which Garnishees alleged to have property of the Queen of Spain were attached, on the ground of a debt for interest on bonds entered into by or on her behalf as Queen Regent, for her daughter the Queen of Spain. On motion to discharge the attachment on common bail, the Recorder held that an attachment was not equivalent to an arrest, but was analogous to a distringas. He would not enter into the merits, but denied the application.

This case came before the Queen's Bench,³ and it was held that a foreign sovereign was not liable on contracts made in a sovereign capacity. See, also, *De Haber vs. The Queen of Portugal*.⁴

The great principle was that the sovereign was the representa-

¹ *Mortimer vs. Brunner and others*, Sept. 6, 1859—Hoffman, Justice

² *Wadsworth vs. Martin and others*, and the *Queen of Spain*, Locke on Attachments, p. 7.

³ *Wadsworth vs. The Queen of Spain*, 17 Queen's Bench Rep. 171.

⁴ *Ibid.*

tive of the nation of which he was the head, and no English court could entertain an action against him for any act done or omitted to be done in his public capacity as such representative. As the court had no jurisdiction over the person, an attachment of the property in another's hands could not be sustained. A prohibition went to the mayor's court.

The case of *The Duke of Brunswick vs. The King of Hanover* (6 Beavan, 1st & 2d House of Lords' Cases, 1) was cited and relied upon.

Lord Campbell said: "To cite a foreign potentate in a municipal court for any complaint against him in his public capacity, is contrary to the law of nations, and an insult which he is entitled to resent."

Against absconding or concealed party.—The attachment may issue against a defendant who has absconded or concealed himself.

There was a similar provision in the Revised Statutes: "The real and personal property of a debtor may be attached for the payment of his debts whenever such debtor, *being an inhabitant of this State*, shall *secretly* depart therefrom, with intent to defraud his creditors, or to avoid the service of civil process, or shall keep himself concealed therein with the like intent." (2 R. S., p. 3, § 1.)

The clause of the Code now considered must be examined in connection with the 229th section. The affidavit is to show that the defendant has departed from the State with intent to defraud his creditors, or to avoid service of a summons, or keeps himself concealed therein with a like intent.

The clause appears to imply residence or inhabitancy within the State, and then the Code scarcely differs from the statute, except as to the secrecy of the departure.

It has been held that the absconding or departure need not be made secretly, but that it will be sufficient if the intent is made out to avoid service of the summons by the departure.¹

An affidavit that the plaintiff believes the defendant keeps himself concealed to avoid service, is not sufficient. Facts upon which the belief is founded must be set forth, so that the court

¹ *Morgan vs. Avery*, 7 Barbour, 656; 2 Code Rep. 91.

may judge whether there is ground for such belief. It should be stated that inquiry has been diligently made, and where made, and of whom.¹

It is a concealment to avoid service of the summons—no matter for what length of time—no matter if with a view to make a disposition, even lawful, of his property—the placing himself designedly so that his creditors cannot reach him with process, which is the concealment contemplated in the act.²

The question seems to be, did the defendant conceal himself, even temporarily, with the purpose of avoiding service of the summons?³

We find, by comparing this clause with the 229th section, that the absconding from the State may be either with the intent to defraud creditors, or to avoid service of the summons. So the concealment in the State is not, it is supposed, to be exclusively with the intent to defraud creditors, but with that intent, *or* with the intent to avoid the service.

In *Castellanos vs. Jones* (1 Selden, 164), the affidavit of the applicant stated that the said Rodriques was an inhabitant of this State, but that since the 14th of January instant he has absconded or concealed himself to avoid service of civil process; that said Rodriques cannot be found, and is not at his usual place of business; that deponent has tried to serve civil process upon him, but that he cannot be found; that his sign has been removed from his store within the last two days, and that the person in charge refused to give any information as to where he was concealed or gone to.

The affidavits of two persons were annexed. The application was held defective on different grounds; and the affidavit verifying it, and above set forth, was declared to fall short of stating the facts authorizing an attachment. Although it was stated that Rodriques was an inhabitant of the State, it did not affirm that he had departed therefrom, with intent to defraud his creditors, secretly or otherwise; or that he had departed therefrom to avoid

¹ *Camman vs. Tompkins*, 1 Code Rep. N. S. 12.

² *Ibid.*

³ *Ibid.* and *Genin vs. Tompkins*, 12 Barbour, 265.

the service of civil process, or that he kept himself concealed within the State with the like intent.¹

In *Van Alstyne vs. Erwine* (1 Kernan, 331), under the Revised Statutes, the affidavit was in the disjunctive—that the debtor had departed from the State, *or* was concealed within it, with an intent to defraud his creditors. The facts stated in the affidavits would sustain either aspect of the case. The case of *The People vs. The Recorder of Albany* (6 Hill, 429) was cited to the point, that where the circumstances are such that it is doubtful in what particular the defendant's conduct has brought him within a statute, the creditor has only to state all the facts, without electing which aspect he will adopt. The affidavit was held sufficient.

Removal of property.—The attachment may issue whenever any person or corporation is about to remove any of his or its property from the State.

By section 229 the affidavit is to show, that such person or corporation *has removed*, or is about to remove, any of his property from this State, with the intent to defraud his or its creditors, whether such defendant be a resident of this State or not.

The provision in question was enacted in the amendments of 1857.

Section 179, subdivision 5, contains a similar provision, authorizing an arrest under such circumstances, except that the removal *from this State* is not found in it.

The 34th section of the Non-Imprisonment Act of 1831,² relative to suits by attachment in Justices' Courts, provides that the suit might be so commenced, when it shall satisfactorily appear that the defendant is about to remove from the county any of his property, with intent to defraud his creditors; and by the fourth section of the same act, a warrant to arrest a party may issue, "when the defendant is about to remove any of his property out of the jurisdiction of the court in which the suit is brought, with intent to defraud his creditors."³

¹ This case, exacting great precision and fullness in the affidavit, should be carefully studied by the practitioner.

² Sess. Laws, 1831, ch. 310, p. 404.

³ See 2 R. S., 5th Ed., Vol. 3, p. 126.

Under this 34th section it was held, in *Smith vs. Luce* (29 Wendell, 237), "that an affidavit that the deponent believed that J. S. is about to remove, or has removed from said county his property, with intent to defraud his creditors, or has assigned, disposed of, secreted, or is about to assign, dispose of, or secrete his property, with the like intent," was insufficient. The justice must be satisfied, and he must be so satisfied from proof of facts and circumstances. Facts must be shown which leave no reasonable doubt on his mind.

In *Vredenburg vs. Hendricks* (17 Barbour, 179) the affidavit comprised the allegation that the defendant had removed or disposed of his property with intent to defraud his creditors, or was about to do so. The rule was stated, that there must be some legal evidence (it might be slight) to give jurisdiction; but some evidence calling upon the judgment of the officer as to its sufficiency. The facts stated in the affidavit were then examined, and held wholly inadequate to warrant the attachment.

In *Mott vs. Lawrence*,¹ the attachment was applied for on the ground of an intent to remove property out of the county. The only facts sworn to were, that the defendant closed up his place of business on the 21st of October, 1858, and immediately commenced packing up his goods, and continued packing them till midnight, ready to be removed; that his store was closed the following day, before the warrant issued; that on the 20th October, he had removed his family, without informing the plaintiff, who resided in the same building. The affidavit was held to be insufficient. It did not make a clear *prima facie* case.

The attachment in this case had been granted by a justice under the statute of 1842, p. 74. This will account for the language of the court, that no counter proof can be allowed on a motion to discharge the attachment.

It is settled by decisions in other States, under provisions very similar to the present, that the naked fact of removal of property out of the State is not sufficient. It must be done with a view to the injury of a creditor; with the intent to defraud his creditors, as is expressed in our own provisions.

Thus, where the subject attached was a steamboat, purchased

¹ 17 Howard, 559, Gen. Term Common Pleas.

of the plaintiff, and the regular business of which was running out of the State and back, and no special case of fraud was made out, the attachment was held invalid.¹

So, where a large amount of the debtor's property remained in the State, and the writ was levied on some iron, all the property in the county, evidence of the possession of the other property, free of incumbrance, and sufficient to pay the demand, was held admissible upon the question of injury to the creditor.²

Fraudulent assignment or secretion of property, &c.—An attachment may issue when any person or corporation has assigned, or disposed of, or secreted, or is about to assign, dispose of, or secrete any of his or its property, with the intent to defraud creditors. Section 229 adds the words, "whether such defendant be a resident of this State or not." This provision is first found in the amendment of 1857. "The Code speaks of the secreting of the *defendant's* property. By that is meant any property in his possession, and to which he claimed title, although his title is imperfect, or clearly bad. The attachment lies, if the defendant has, or is about to secrete any single piece of his property, and extends to all his property of every kind, because the single act shows a readiness and intent to extend the offence as far as may be necessary to promote his fraudulent designs. . This design is as manifest in concealing embezzled property as in concealing that which is lawfully his."³

The allowance of judgments to go by default, without showing any fraud or collusion between the judgment debtor and creditor, is not a conveyance or disposition of property within this section.⁴

Conveyances, by the debtor, apparently absolute and made under suspicious circumstances, may be explained by affidavits, and the purposes and consideration stated. The apparent fraudulent intent may thus be negated.

Thus, in *Rigney vs. Talmadge*, before cited, a deed of prop-

¹ *Russell vs. Wilson* (18 Louis. Rep. 36).

² *White vs. Wilson* (10 Illinois Rep. 21). See also *Runyon vs. Morgan*, 7 Humphreys, 210, cited by Mr. Drake on Attachments.

³ *Treadwell vs. Lawlor* (15 Howard Pr. Rep. 8, Gen. Term, 1st District).

⁴ *Rigney vs. Talmadge* Special Term, 1st Dist., Sept. 1859, Ingraham, J. (17 Howard, 556).

erty was made to one Harder, which, from the omission to state the purposes (of security) for which it was given, and other circumstances, was suspicious, and warranted an attachment. The affidavits satisfied the court that it was made for honest purposes, in order to protect the grantee for his liability as surety fairly entered into, and sufficient to disprove a fraudulent intent.

A threat by a debtor, that he would assign and put his property out of his hands, made in words, which may be construed to mean that he would make a lawful assignment, is not, without any evidence of contemporaneous or subsequent acts showing a fraudulent intent, a sufficient ground for an attachment. In this case, the defendant afterwards made a legal assignment. The language of the affidavit was, that the defendant said he wished to compromise with his creditors; and if the deponent did not agree to take $33\frac{1}{3}$ per cent., he would go home and make an assignment of his property, and that plaintiffs would not get anything of their claim, and that he would put his property out of his hands sooner than pay them more than $33\frac{1}{3}$ per cent.¹

Attachment and arrest or injunction together.—It has been held that an attachment and arrest may be granted simultaneously.

In *Lithaner vs. Turner* (1 Code Rep. R. S. 210) a motion to vacate an order of arrest was denied, although it was admitted that an attachment between the same parties, and for the same cause of action, was pending, and some property garnished in Arkansas. A similar decision was made in *Fowler vs. Brock*, April 7, 1851. (Ibid.)

The question in these cases properly was, whether an action depending in another State would bar one here.

In *Merritt vs. Thompson* (3 E. D. Smith, 284), it was held that an injunction might be granted, although upon the same state of facts, and additional facts, the plaintiff made a case entitling him to an order of arrest.

In *Beebe vs. Rogers*,² an order of arrest was granted upon affidavits, showing the obtaining of goods on false pretences, and an attachment on the ground of a fraudulent disposition of property. In March, 1860, a motion was made before Hoffman, Jus-

¹ *Wilson vs. Britton*, 6 Abbotts' Rep. 97; 26 Barbour, 562.

² Chambers Superior Court, Oct. 27, 1859—Bosworth, Justice.

tice, to discharge both, upon affidavits touching the merits in each instance, which application was denied. Upon appeal, the order was affirmed by the General Term, May 26, 1860. The point was not raised by counsel, but was discussed by the judges.

In *Clark vs. Tuggle* (18 Georgia Rep. 606), the case was in fact one of two actions, one by a bailable writ and another by attachment, upon the same cause of action between the same parties. The plaintiff could be allowed to go on in both.

In *Mills vs. Block* (30 Barbour, 549) a creditor, having an attachment regularly issued and property levied, had, it was held, obtained a lien which was as effectual as an injunction to restrain any disposition of the property. No injunction ought, therefore, to be allowed before judgment to restrain a disposition of it.

In *Naylor vs. Eagar* (2 Young & Jarvis, 90), there had been proceedings taken in New South Wales by process of attachment of goods against the defendant, who was arrested for the same debt in England. The court say, "Had the affidavit proceeded to state that under that attachment, goods of the defendant had been seized sufficient to satisfy the demand of the plaintiff, that would have been a strong case to induce the court to interfere, and to say that he should not be compelled to give a new security in this country for the same debt. But it was incumbent on the defendant to make out that case clearly, which he had not done."

In *Trafton vs. Gardiner* (39 Maine Rep. 501) it was ruled that an attachment of property and an arrest of the person could not be directed in the same writ. If the attachment was returned, there could be no arrest, although the attachment proved ineffectual.

Time of obtaining warrant.—The plaintiff may have the property of the defendant attached at the time of issuing the summons, or at any time thereafter.

By section 228 the warrant must be obtained from a judge of the court *in which the action is brought*, or by a county judge.

A summons may of course be issued before the attachment; indeed the latter may be applied for at any time during the suit. But the summons must be issued at any rate before the attachment can be executed. The making it out and delivering it to a person to be served, is a compliance with this requisition. It is not prescribed that the summons shall be served, which is the

regular commencement of the action. But where the attorney had made it out, and attempted to have it served before obtaining the warrant, it was considered to have been issued. The placing it in the hands of a person with authority to serve it, and a *bona fide* intent to have it done, was sufficient.¹

Some act indicating not only that the summons is prepared, but is put in a course to be served, should be shown.²

It may be doubted whether the rule stated in *Perry vs. Montgomery* (2 Sandf. Supr. Ct. Rep. 661) is correct, that an attachment issued before service of a summons, but served with it, was void. If the summons was really issued—prepared before or at the time of the attachment, it would seem to be enough.

It is stated in one case, “that it has been repeatedly held that the attachment is the commencement of process, although no summons be served. The issuing of a summons is not the commencement of an action; its issuing is not necessary to the validity of the attachment. This also has been repeatedly held in this court. The court acquires jurisdiction from the time the summons is served, or any provisional remedy is allowed. (Code, § 139.)”³

Nothing can be more completely contradictory to this than the language of the court in *The matter of Griswold* (13 Barb. 412). “Under the Code, it is clear that the issuing of the warrant of attachment, or the attaching property under it, is not the commencement of the action. It is a mere provisional remedy in an action, which action is commenced by the issuing of a summons, and the service of it in some one of the methods pointed out in the Code. It is difficult to see how it can be a jurisdictional question, so long as it is a mere proceeding or provisional remedy in an action. The Code, it is true, provides (§ 139) that the court shall be deemed to have acquired jurisdiction from the time of service of the summons, or the allowance of a provisional remedy. Still the action is commenced by the summons, and it is proof of the issuing and service of that which gives the authority to proceed, as in an action, and render judgment, where the defendant does not appear.”

¹ *Mills vs. Corbett*, 8 Howard, 500.

² *Conklin vs. Dutcher*, 5 Howard, 386.

³ *Treadwell vs. Lawler*, 15 Howard, p. 8, Gen. Term, First Dist.

So, in *Cruyt vs. Phillips* (16 Howard, 120), Justice Emott says: "An attachment in an action in this court is not process by which an action is commenced, but merely a provisional remedy. In this respect it is like an injunction. It has therefore been held, that the statements in the affidavits on which an attachment has been issued, are not jurisdictional facts. The jurisdiction is conferred by the commencement of the suit; all afterwards is a question of regularity, or the discreet exercise of power."

To hold that the last clause of section 139 makes the allowance of an attachment sufficient without a summons, issued at least, seems to nullify the operation of the clause, that the plaintiff may have the property attached *at the time* of issuing the summons, or at any time thereafter. The 228th section presupposes *an action brought*. Perhaps the last clause of section 139 is satisfied if applied to cases where the attachment had been allowed and executed, yet the summons, though duly issued at the time, had not been served from accident. The court then would have jurisdiction upon a question connected with the attachment.

In *Gould vs. Bryan* (3 Bosworth Rep. 626) it was held that the attachment may be issued, and made to accompany the summons into the sheriff's hands, and may be served after the due personal service of the summons has been made; and when so issued and served it will be regular and valid. The phrase, "in an action for the recovery of money," used in section 227, designates the class of actions in which an attachment may issue, and does not make the actual commencement of a suit by the service of a summons, an essential pre-requisite to the jurisdictional competency of the Superior Court to grant an attachment.

It was also held that an attachment against the property of a non-resident debtor might be issued, as well as an order of arrest be made, before actual service of the summons, but could not be executed until the summons had been served.

Manner and object.—"The plaintiff may have the property of the defendant or corporation attached, in the manner thereafter prescribed, as a security for the satisfaction of such judgment as the plaintiff may recover."

The corporation must be a defendant in the action, as much as an individual.

The manner of attaching is pointed out in subsequent sections, and is hereafter stated.

What property may be attached is a subject of great importance, and is discussed under the 234th section, *post*.

The property remains in the possession, or under the assumed legal control of the sheriff, as security for the judgment, should the plaintiff succeed in recovering one. The attachment is a species of sequestration, by which the property is held to abide the event of the action, unless re-delivered under sections 240 and 241.

The mode of disposing of the property, in the event of the plaintiff's or of the defendant's success, is stated under sections 237 and 238, *post*.

Not a jurisdictional question.—It appears to follow from the doctrine that an attachment is not the process for commencing an action, but an auxiliary remedy in an action, that granting it is not a jurisdictional question, and hence an attachment cannot be questioned collaterally. It has been so repeatedly decided.

In *The matter of Griswold* (13 Barbour, 412), before cited, this was expressly held, upon a motion on behalf of a subsequent attaching creditor, to set aside a previous attachment, on the ground of the insufficiency of the affidavit.

In *Morgan vs. Avery* (7 Barbour, 656) several points were decided, and among them this, that where an attachment has been issued against a person as an absconding debtor, the sufficiency of the affidavits on which it issued, is no longer a jurisdictional question. Although the learned judge calls it *process*, he admits it is not original process, for no suit can be commenced by it.

Section 228.

“Warrant, by whom granted.

“A warrant of attachment must be obtained from a judge of the court in which the action is brought, or from a county judge.”

If the court has jurisdiction of the action, a judge of that court may, of course, grant the warrant. It may be useful to notice that the case of *Renard vs. Hargous* (2 Duer, 540 ; 3 Kernan, 259) arose under the Revised Statutes, and turned upon the power of the judges of the Superior Court of the City of New York to issue an attachment as Supreme Court Commissioners.

As an attachment under the Code is a provisional remedy—a species of sequestration in the action, the court, a judge of which issues it, must have jurisdiction of the action.

As to the extent of the power of the county judge, see *Arrest and Bail, ante*, § 180, p. 43.

Section 229.

“In what cases warrant may be issued—Affidavits to be filed.

“The warrant may be issued whenever it shall appear, by affidavit, that a cause of action exists against such defendant, specifying the amount of the claim and the grounds thereof, and that the defendant is either—

“1st. A foreign corporation, or not a resident of this State, or has departed therefrom with intent to defraud his creditors, or to avoid the service of a summons, or keeps himself concealed therein with a like intent, or—

“2d. That such corporation or person has removed, or is about to remove, any of his or its property from the State, with intent to defraud his or its creditors ; or has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete any of

his or its property, with the like intent, whether such defendant be a resident of this State or not.

“3d. It shall be the duty of the plaintiff procuring such warrant, within ten days after the issuing thereof, to cause the affidavits on which the same was granted to be filed in the office of the clerk of the county in which the action is to be tried.”

The first clause of this section remained unaltered from 1849, the time of its adoption, until 1857. By the act of April 17th of that year, which went into effect on the 7th of May, the addition contained in the subdivision marked 2 was made. On the 18th of April, 1860, the paragraph marked 3 was passed.

The affidavit must show that a cause of action exists against the defendant, specifying the amount of the claim, and the grounds thereof.

It has been held in England that the assignees of a bankrupt, executors, and administrators, need only swear to the belief of the debt, this being as certain as the nature of the thing will bear.¹

An affidavit by one of several plaintiffs, in which it was stated that the plaintiffs aver certain facts to be true, is an allegation of the existence of those facts, and an averment of their existence by the plaintiff, who swears to the affidavit. It was equivalent to “the deponent avers.” The existence of the facts ‘did, therefore, appear by affidavit.’²

In *Donelly vs. Corbett*,³ an affidavit “that the demand arose upon a judgment which, deponent has been informed and believes, was obtained in or about the year 1843, by this deponent, &c., in a court, &c., against the said, &c., on a promissory note for \$962.12, dated, &c., was held sufficient. The fact of the judgment was considered to be positively alleged. The information and belief referred to the time of its rendition.

The affidavit upon which the proceeding is authorized should be explicit, and made, in general, upon positive knowledge of the deponent, so far as to establish a *prima facie* case.

In general there is no difficulty in obtaining the affidavits of the persons who give the information on which the plaintiff desires to proceed; and when such information cannot be obtained,

¹ Locke on Foreign Attachments, p. 5, and cases in note.

² Jamison vs. Beecher, 4 Abbott, 230.

³ 3 Selden, 500.

from the peculiar circumstances of the case, those circumstances must be stated, with all the grounds of belief, so as to satisfy the judge that the facts exist on which the attachment is sought, and that the plaintiff has produced the best evidence in his power to establish them.¹

“It is not sufficient to swear that the plaintiff believes that the defendant keeps himself concealed to avoid the service of a summons. The grounds of the belief must be set out, so that the judge who issues the warrant may have such belief, and the court may be able to determine whether it would be well grounded in any one.” It is not sufficient to state that diligent inquiry has been made for the defendant; that he was not to be found, nor could it be ascertained whither he had gone. It should be stated where the inquiry was made, of whom, and when, so that the judge may determine whether the inquiry has indeed been diligent and conducted in good faith.²

It is true that Mr. Justice Paige, in *Furman vs. Walter*,³ in an elaborate opinion, questions this doctrine, and appears to hold that, under the peculiar language of the Code, as it omits the requirements of the Revised Statutes, and of the act of 1831, that the facts and circumstances to establish the grounds of the application should be stated in the affidavits—the positive allegation of the fact (as departure from the State with the intent to defraud creditors) would be enough.

The learned judge did not make any express decision to this effect, and the weight of authority appears to be otherwise.

In *Gasherie vs. Apple* (14 Abbotts' Rep. 64), the defendant moved to discharge an attachment. It appeared that the action was to recover the price of goods sold, and the attachment had issued upon an affidavit stating an intent of defendant to dispose of property with a view to defraud creditors; a promise to take an account of stock, and to give the plaintiffs security, a refusal to do so; and a statement, made the 22d of July, 1861, that if the plaintiffs sued him, he would make an assignment; that they should not get anything; and he would do his business under another person's name. After the attachment was levied, the defendant made a general assignment. The expressions stated in the affida-

¹ *St. Amand vs. Beixodon*, 3 Sandford's S. Ct. Rep. 703.

² *Camman vs. Tompkins*, 1 Code Rep. N. S. 12. ³ 13 Howard's Pr. Rep. 348.

vit, on the part of the plaintiff, were denied. On the motion, the plaintiff offered corroborating affidavits as to those expressions.

Mr. Justice Robertson held the affidavits to be admissible, relying upon *St. Amand vs. Beixodon* (3 Sandf. Sup. Ct. Rep. 703). And after a careful examination, and referring to the cases of *Wilson vs. Britton* (26 Barbour, 562) and *Dickinson vs. Benham* (10 Abbott, 390, 11 *ibid.* 158), he held, that a threat by a debtor to a creditor, to make an assignment, so as to deprive the latter of all share of his estate if he commenced an action, appeared to be as much evidence of a fraudulent intent in fact, as the actual making of an assignment with a like provision in it, is of a fraudulent intent in law.

The threat also to carry on the business in the name of another, could only be understood as intending to conceal the defendant's property or earnings from the plaintiff's claim.

See, also, *Skinner vs. Pettinger*, 14 Abbott, 109.

The affidavit to warrant an attachment, must be positive as to the facts justifying it; or if upon information and belief, the sources of such information must be fully stated.¹

Section 230.

"Security on obtaining warrant.

"Before issuing the warrant, the judge shall require a written undertaking on the part of the plaintiff, with sufficient surety, to the effect that if the defendant recover judgment, *or the attachment be set aside by the order of the court,*² the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the attachment, not exceeding the sum specified in the undertaking, which shall be at least two hundred and fifty dollars."

This section has remained unchanged since 1851 until 1862, when the words "or the attachment be set aside by the order of the court," were adopted.

¹ *St. Amand vs. Beixodon*, 3 Sandf. S. Ct. Rep. 103; *Furman vs. Walter*, 13 Howard, 348; *Blason vs. Bruno*, 21 Howard, 112.

² Amendment of 1862.

The undertaking may be in the form of a penal bond to the defendant, as the Code has not prescribed the form. The condition of the undertaking should be clearly expressed in the language of the Code.¹

The undertaking is to be "on the part of the plaintiff, with sufficient surety." Of course, under this, one surety is sufficient. And what is the meaning of the phrase "on the part of the plaintiff," is examined under section 182. (*Ante*, p. 49.)

It should be proven or acknowledged as required by the 6th rule of the Supreme Court of 1858; but a defect in this particular can be supplied on a proper application.²

It must be forthwith filed with the clerk of the proper county, with the approval of the justice endorsed thereon, and if not filed within five days after the order has been granted, an application may be made to vacate the proceedings for irregularity. The affidavits upon which it was granted must be in like manner filed. (Rule 4 of Supreme Court, 1858.)

It appears to be settled in several States, that an insufficient bond taken on an attachment, can only be objected to by the defendant, and cannot be by others, not even by other attaching creditors.³

The undertaking must be filed with the clerk of the court, unless the court expressly provides for a different disposition thereof.⁴

It must be acknowledged or proven, in like manner as deeds of real estate, before it can be received or filed.⁵

The fourth rule of the Supreme Court, adopted in 1858, provides that it shall be the duty of the plaintiff's attorney forthwith to file with the clerk of the proper county all undertakings given upon procuring an order of arrest, an injunction-order, or an attachment; and in case such undertaking shall not be filed within five days after the order, or attachment, the defendant shall be at liberty to move the court to vacate the proceedings for irregularity, with costs, as if no undertaking had been given. It

¹ Conklin *vs.* Dutcher, 1 Code Rep. N. S. 49; 5 Howard, 386.

² Conklin *vs.* Dutcher, *ut supra*.

³ Wigfall *vs.* Byrne, 1 Richardson, 412, and other cases cited in Drake on Attachment, § 142.

⁴ Section 423 of the Code.

⁵ Rules of Supreme Court, Rule 6, of 1858.

shall also be his duty to file, within the same time, and under the like penalty, the affidavits upon which an attachment has been granted.

The omission to acknowledge or prove the undertaking can be remedied by amendment on proper terms.¹

The undertaking may be amended under the 173d section of the Code. This was ruled as to an undertaking upon an arrest, in *Bellinger vs. Gardner*, 2 Abbott, 443, S. C. 12 Howard, 381.

In *Beach vs. Southworth* (6 Barbour, 173) the subject of amending the undertakings under the Code was examined, and the applicability of the Revised Statutes (2 R. S. 787, §§ 33, 34) was sustained. The case related to appeals; but the reasoning is pertinent to all undertakings.

Section 231.

“Warrant, to whom directed, and what to require.”

“The warrant shall be directed to the sheriff of any county in which property of such defendant may be, and shall require him to attach and safely keep all the property of such defendant within his county, *or so much thereof as may be sufficient to satisfy the plaintiff’s demand, together with all costs and expenses; the amount of which must be stated in conformity with the complaint, together with costs and expenses.*”

“Several warrants may be issued at the same time to the sheriffs of different counties.”

The words italicised were adopted into the Code in July, 1851.

The signature of the judge is all that is necessary. The formal teste, seal of the court, and signature of the clerk, are not requisite. No return-day need be inserted, but the signature of the attorney should be affixed.² The attachment is a written order of the judge. By section 400 every direction of a court

¹ *Conklin vs. Dutcher*, 5 Howard, 388.

² *Genin vs. Tompkins*, 12 Barbour, 265.

or judge made, or entered in writing, and not included in a judgment, is denominated an order.¹

The amount of the demand should be stated in the warrant. That forms a guide to the sheriff as to the amount of property to be taken. The amount in the warrant must correspond with that in the complaint.

The warrant may be amended. In *Cornish vs. Cole*,² an attachment was issued, and property taken. The amount was omitted in the warrant. On the succeeding day the amount was inserted by the same judge. The demand in the summons was \$2,000. One of the defendants, member of a firm, was served with the summons on the day that the attachment was issued. The affidavit also specified the amount. The case of *Genin vs. Tompkins* (12 Barbour, 285) was cited, and it was held that the 173d section was applicable.

Appeal.—An appeal may be taken under section 349, from an order granting or refusing, continuing or modifying a provisional remedy.

Generally, the defendant moves to discharge the attachment, and from the order granting or denying such motion an appeal is taken.

It is presumed that the warrant itself is a written order of the judge, which may be appealed from, but perhaps it should be entered with the clerk under section 350.

What property.—What property may be attached is discussed under section 234, *post*.

Section 232.

“Mode of proceeding in executing warrant.”

1. “The sheriff to whom such warrant of attachment is directed and delivered, shall proceed thereon, in all respects, in the manner required of him by law, in case of attachments against absent debtors.

2. “He shall make and return an inventory.

¹ *Conklin vs. Dutcher*, 5 Howard, 389; *Bank of Lansingburgh vs. McKee*, 7 Howard, 360.

² Special Term, Superior Court, Nov. 1854, Hoffman, J.

3. "He shall keep the property seized by him, or the proceeds of such as shall have been sold, to answer any judgment which may be obtained in such action.

4. "He shall, subject to the direction of the court or judge, collect and receive into his possession, all debts, credits, and effects of the defendant.

5. "The sheriff may also take such legal proceedings, either in his own name or in the name of such defendant, as may be necessary for that purpose, and discontinue the same at such times and on such terms as the court or judge may direct."

1. Mode of proceeding.—The sheriff is to proceed, in all respects, in the manner required by law in cases of attachment against absent debtors.

These provisions are found in the Statute 2 R. S., p. 3, § 7, *et seq.*

By the 7th section, "The sheriff to whom any such warrant shall be directed and delivered, shall immediately attach *all the real* estate of such debtor, and all his personal estate, including money and bank notes, except articles exempt from execution; and shall take into his custody all books of accounts, vouchers, and papers relating to the property, debts, credits, and effects of such debtor, together with all evidences of his title to real estate, which he shall keep to be disposed of as hereinafter directed."

Several important differences must be noted. By the statute, all the property is to be attached; by the Code, all the property, or so much as will satisfy the plaintiff's demand. By the statute, the subsequent directions provide for an appropriation of the proceeds through Trustees, among all the creditors; by the Code, it will be applied to the judgment of the applicant.

An important question arises under this part of the section, whether the attachment is not continuously in force, so that the sheriff may attach other property in the same person's hands, or property in the hands of other persons, down to the time of an execution being executed.

The rules as to executions, that the lien upon goods not levied upon, expires with the return,¹ and that when the actual return-

¹ Watrous *vs.* Lathrop, 4 Sand. Sup. Ct. Rep. 700.

day is spent, the sheriff may not levy, although the writ remains in his hands,¹ are inapplicable, as no return-day is prescribed for the attachment.

In general, the rules as to executions govern in the case of attachments; at least afford an analogous rule. It is settled that the sheriff may levy upon other property at a subsequent time. "There is no restriction upon the officer as to the amount of property he shall take, nor is he required to levy upon the property at the same time. It would be extremely dangerous to hold, that when the officer has once levied upon sufficient property to satisfy the execution, his power to levy upon more was gone. How is he to know when he has made a sufficient levy? This cannot be ascertained with certainty until the sale."

The point was decided that one levy, though of property apparently sufficient to pay the judgment, did not preclude a further levy on other property, no change of title having been effected, nor the debtor deprived of his property.²

The form of an execution is to levy of the goods, &c., enough to satisfy the judgment, and of the attachment, to take the property, or so much as will satisfy the plaintiff's demand.

In the case of *Merritt vs. Curtis* (18 Maine, 272), it was held that a levy, under an attachment, of more property than was necessary, did not invalidate the attachment; although if the sheriff acted oppressively, he might be subject to an action by the party injured.

And in *Abbott vs. Kimball* (19 Vermont, 551), it was decided, that in order to sustain an action for an excessive attachment of property, the plaintiff must allege and prove much the same that he would in a suit for a malicious action—that is, want of probable cause, and a malicious intent.

Real Estate.—By the Revised Statutes, the sheriff was to attach all the real estate. Under the Code, it is, in the first place, necessary, in order to make an attachment valid as against purchasers or incumbrances, that a notice of *lis pendens* be filed under section 132. It is also decided, that under the Code the sheriff need not enter upon the land. "For the purpose of

¹ 4 John Rep. 450; 13 *ibid.* 255.

² *Denvry vs. Fox*, 22 Barbour, 522, and the cases therein examined, General Term, 8th District; *Peck vs. Tiffany*, 2 Comstock, 451.

securing the lien upon it, it is only necessary that it should be included in the inventory returned by the sheriff. The mere return that he has attached the land, is enough to secure a lien for the creditor, to be enforced when he shall have obtained judgment." (Harris, Justice, in *Learned vs. Vandenberg*, 7 Howard, 379.)

This case was before the General Term on appeal; and the order was affirmed.¹ As the real estate had not even been stated in the inventory, and nothing else done showing even a claim upon it, a judgment subsequent to the attachment was let in before it. But it is not clear that the General Term meant to say, that inclusion in an inventory alone would be sufficient. "There must be a seizure, or an exercise of control, or, at least, a claim made to hold it under the attachment."

In *The People vs. Conolly* (8 Abbott, 128) it was held that the 132d section applied only to subsequent purchasers and incumbrancers; and where the notice named the parties in the action, and the attorney insisted upon its being recorded as against others named as prior grantees, a mandamus to the clerk was refused.

2. Inventory.—By section 8 of the Revised Statutes, the sheriff shall immediately on making such seizure, with the assistance of two disinterested freeholders, make a just and true inventory of all the property so seized, and of the books, vouchers, and papers taken into his custody, stating therein the estimated value of the several articles of personal property, and enumerating such of them as are perishable; which inventory, after being signed by the sheriff and appraisers, shall, within ten days after such seizure, be returned to the officer who issued such warrant.

3. Seizure and retention of property.—The sheriff to keep the property seized by him, or its proceeds, to answer any judgment.

In *McRay vs. Harrower* (27 Barbour, 463) the court say: "It was quite clear, that with respect to property seized by the sheriff, by virtue of an attachment under the Code, he must retain it in his possession until the determination of the action in which the attachment has issued; and if the plaintiff recovers judgment, until the property is sold under an execution issued thereon, un-

¹ 8 Howard, 77.

less the judgment be otherwise satisfied, or the property be sold as perishable.”

The case of *Moore vs. Westervelt*, cited under section 215 of the Code (*ante*, p. 130), is of importance under the present section, in relation to the duty of the sheriff as to the keeping of property once attached, and what will constitute negligence in him, for which he may be made responsible.

Two important questions arise, which may be considered under this clause: first, when the attachment takes effect as to the debtor or garnishee; next, how are the relations adjusted between various attachments against the same debtor.

There is some authority to show that, neither the issuing of, nor delivery of, the warrant to the sheriff, has any effect in any particular; or in relation to any species of property. It is only the actual or constructive levy or seizure, which has the effect of constituting a lien.

It seems a universal rule in the States in which the system prevails, except when a statute has prescribed otherwise, that the issuing of the attachment has no force, either with reference to the defendant's rights, or those of third persons; nor its lodgment in the hands of the officer; but its effect is to be dated from the time of its actual service.¹

In *Kuhlman vs. Orser* (5 Duer, 242) it was decided, that as against a purchaser in good faith, no lien was created by the issuing of the process; and the goods could only be bound from its execution, by the actual or constructive levy as there described. The case was resembled to that of a purchaser after execution delivered, and before levy.

In *Ransom vs. Halcott* (18 Barbour's Rep. 56) five attachments were issued at successive periods in favor of several plaintiffs. A levy was made under the first on all the personal property, and an inventory made. The others were levied on the same property as they came to hand. But upon the fifth attachment the sheriff levied also on the real estate. The personal property only satisfied the first two attachments, and the third in part. The present plaintiffs had issued the fourth attachment. It was held that as to the real estate, the levy under the fifth gave it a preference over the fourth; and that the sheriff was liable to

¹ Drake on Attachment, p. 218, and cases.

the plaintiffs for not levying on their attachment, upon such estate.

The court declared that it was the right of the creditors to have their respective attachments take priority according to the date of their delivery to the sheriff. Yet the act of the sheriff gave the fifth attachment a priority over the fourth. The court must, therefore, mean that the right was a right as between the sheriff and themselves; and his neglect of his duty made him responsible.

In *Learned and others vs. Vandenberg* (7 Howard, 379; on appeal, 8 *ibid.* 77) the rule was stated that an attachment was not a lien on property, either real or personal, until a levy was made under it.

In the act for proceeding against foreign corporations (2 R. S. 376, §§ 15, 16, 21) the language was, that "the sheriff was to keep the property *seized* by him, or the proceeds of any sold, to answer any judgment which may be obtained in such suit." Under this, the case of the *American Exchange Bank vs. The Morris Canal Co.* (6 Hill, 362) decided, that the lien on real estate dated from the time of the seizure.

The general rule in other States is, that the first attachment served is entitled to priority over subsequent attachments, and that the lien takes effect, as between different plaintiffs, from the time of service.¹

If the writs were delivered at different times, but served together, the court in Massachusetts has held, that the avails were to be distributed according to a rule adjusted upon the number of the writs.²

In other States the division is made *pro rata*, in such a case.

In *Learned vs. Vandenberg* (7 Howard's Pr. Rep. 379) Mr. Justice Harris said, that "when several attachments have been served upon the same property, the priority of lien, he supposed, must be determined by the order in which the attachments were delivered to the sheriff."

But if no lien is effected until service, and that is simultaneous, it would seem more just, at least, that the rule of a *pro rata* distribution should prevail.

¹ Drake on Attachment, §§ 225, 260, and cases.

² *Rockwood vs. Varnum*, 17 Pick. 289; Drake, § 262, no. 1.

The statute respecting executions (2 R. S. 365, §§ 13, 14, 15) makes the delivery to the sheriff of a *fi. fa.* binding upon personal property, and after providing in the 16th section for the case of several executions, and a sale under a junior one, directs in the 15th section, that if there be several attachments, the rule prescribed in the 14th section shall prevail, in determining the preference of such attachments. The effect of the 14th section is, that although a sale under a junior execution cannot be disturbed, the proceeds are distributed according to the priority of delivery. (2 Comstock, 451.)

It does not seem clear that attachments under the Revised Statutes against absent debtors, &c., are contemplated by this provision. There was no priority to be obtained. Nor is it obvious that these provisions can apply to the wholly new system under the Code, unknown to our law when they were adopted. See Revisers' Notes, vol. 3, p. 727, 2d edit.

In *Patterson vs. Perry*, cited *post*, under this section, the subject was somewhat considered. Mr. Justice Moncrief placed his decision upon the application of these provisions to cases of attachment under the Code. Mr. Justice Hoffman observed: "The Revisers, in their note to these provisions (vol. 3, p. 727), state that they are conformable to 4 Cowen, 411. There a *fi. fa.*, first delivered to the sheriff, took preference of an attachment levied before the *fi. fa.* was levied. *Lambert vs. Spaulding* was relied upon as decisive. The attachment was issued by a justice.

"*Ray vs. Harcourt* (19 Wendell, 495) was decided under the 16th section of the act.

"The provisions referred to can scarcely apply to attachments under the Absent and Absconding-debtor Act, found in the Revised Statutes of 1830. Those proceedings enured to the equal benefit of all the creditors who might come in. Attachments issued under that act could not be discontinued without an opportunity being given to other creditors to proceed. (In the matter of *Bunch*, 9 Wendell, 473.)

"But there was a series of statutes, under which proceedings similar to those under the Code were issued, particularly as to proceedings in Justices' Courts. (See 1 R. L. 1813, p. 393; Laws of 1824, ch. 238, §§ 23, 24.) Under these provisions it has been held that the constable, under an attachment, could take any

goods and chattels which could be levied upon by execution. (*Handy vs. Dobbin*, 12 John. Rep. 220.) The lien executed by an attachment under the act (1 R. L. 1813, p. 398, § 23), when duly served, was paramount to a subsequent execution or attachment. The lien would expire if the creditor did not prosecute his action to judgment and execution with due diligence. (*Van Loan vs. Kline*, 10 John. Rep. 135; *Sterling vs. Welcome*, 20 Wendell, 238.)

“To attachments of this character, the provisions of the Revised Statutes, as to executions, might well apply.

“But the difficulty exists in understanding how these enactments of 1830 can apply to the attachments under the Code, without some special provision making them applicable.

“The 232d section does not meet the case. The mode of proceeding is to be that provided by law. This seems to relate to the sheriff’s course of action in executing the process, but scarcely can extend to the settlement of priorities.

“The 471st section of the Code provides, that the second part of that act shall not affect any existing statutory provisions relating to actions not inconsistent with this act, and in substance applicable to the actions hereby provided.”

“If this section can be deemed pertinent to the question, this difficulty yet remains: If the attachment is ineffectual until service, by seizure or the notice, and no property is within the county at the delivery, but subsequently is found therein and attached by another writ, how can the delivery give the preference?”

The point was not decided, Mr. Justice Pierpont not passing upon it.

It appears to be nearly an universal rule in the States in which this process prevails, that neither the issue of an attachment, nor its lodgment with the officer, confers any rights upon the plaintiff in the defendant’s property. It is only when the writ is served that, as between plaintiff and defendant, and generally as between different plaintiffs, its lien takes effect.¹

¹ Drake on Attachment, § 260, citing 6 Mumford, 176, 9 Conn. Rep. 530, 3 B. Monroe, 260, 2 Brevard, 80, and other cases; *Fairfield vs. Pains*, 23 Maine, 498; *Brainard vs. Bushnell*, 11 Conn. 16; *Shane vs. Dun*, 13 Mass. 529.

In Kentucky, where several attachments came to the hands of the same officer at different times, it was held that as it was his duty to have executed them in the order of reception, and the court had control of the funds, it would dispose of it according to such legal priorities.¹

See, further, as bearing upon this subject, the discussion under section 235, of the necessity of a specification in the notice, by the officer, of the property to be affected.

When the proceedings are against a foreign corporation, it may be suggested whether the thirtieth section of the act of the proceedings against corporations is not in force (2 R. S. 461, § 30); and when several attachments are issued during the same term, or vacation, the proceeds are to be divided according to the amount of the judgments. (See Laws of 1840, ch. 354; of 1842, ch. 197; Laws 1845, ch. 234; Laws 1848, ch. 53; Code, § 471; 11 Howard, 186.)

In the case of *Patterson vs. Perry*,² a new and interesting question arose. Albert Lewis was a debtor whose property was sought to be attached. On the 6th of April, 1854, a notice of attachment was served on one Perry, requiring him to hold property, or its avails, in his hands, in an action brought by White, Warner & White. Perry was a consignee, and had made advances. At the time of this service he had some goods unsold on hand, but far less than the money due to him from Lewis for his advances. He held also at that time immature notes and acceptances for produce previously sold to an amount exceeding eight thousand dollars—all, however, being insufficient to pay his balance and acceptances. He held also bills of lading, with letters of consignment for produce, to an amount which, at invoice prices, and as the sales proved, was sufficient, with the produce and notes on hand, to pay his advances, all subsequent charges, and leave a surplus of over \$6,000. The produce comprised in such bills of lading arrived in New York from Ohio, where they were shipped, between the 8th of April and the 9th of May, 1854. On the 15th of June, 1854, another attachment was served on Perry, at the suit of Mylne & Reed. Perry filed a complaint in the nature

¹ *Kennon vs. Fichlin*, 6 B. Monroe, 414.

² General Term Superior Court, December, 1859, Hoffman, Pierrepont, Moncrief, JJ.

of an interpleader, and brought the surplus money into court, over six thousand dollars, making the above-named attaching creditors, and some other claimants, parties. After the decision at Special Term, all the claimants, except such attaching creditors, abandoned their demands, submitting to the judgment against them.

In each attachment the notice to Perry by the sheriff was of the same general character. In neither was there a specification of the property, nor an inventory made. The point was not raised by any one in the cause. Each of the contesting parties treated the attachments respectively as sufficient to bind what could be bound at the several times in Perry's hands.

It was insisted, on behalf of the attaching creditors of the 6th of April, that their attachment was as valid as to the bills of lading representing goods in course of transportation, as if the goods were in Perry's hands. That point, if tenable, would have been decisive. But the court was clearly of opinion that, under sections 227, 231, 234, the bills of lading were not property within the county of New York, which the sheriff of such county could attach. The cases of *Grant vs. Shaw* (10 Mass. Rep. 341) and *Andrews vs. Ludlow* (5 Pickering, 28) were examined in connection with the Massachusetts statutes, and held decisive of the question. It was therefore held, that an attachment upon a bill of lading merely, of goods not in the county, would not be entitled to preference over an attachment upon the goods when they arrived. A new notice, after arrival and before the second attachment, would indeed be equivalent to an attachment.

Next, it was held, that Perry's lien extended not only to the actual cash balance due him, but to all his acceptances not yet due; and the goods could not be taken from him without an advance of the whole amount. The property to the goods on their way passed to him for various purposes, such as to recover possession, or damages for injuring them. His right of property extended to all the funds and produce, indiscriminately. Neither Lewis nor any one under him could claim a right to separate any particular parcel and withdraw it from Perry's possession. So, correlatively, Lewis' right, or remaining interest, extended on the 6th of April to the goods unsold, the notes unpaid, and the goods represented by the bills of lading, in one blended mass; not more to

the goods in course of transportation than to those in Perry's hands, or the notes of purchasers in his hands. There was then, at the time of the first attachment, property of Lewis in Perry's hands. Payment by Lewis the next day, or by the attaching creditor, would have subjected it to the attachment absolutely.

The subsequent transactions amounted in substance to a remittance by Lewis to pay his debt.

The cases of *Allen vs. Williams* (12 Pick. 297), *Anderson vs. Clark* (2 Bingham, 20), *Haillie vs. South* (1 Bos. & Pull. 513), *Byans vs. Mix* (4 Meeson & Welsby, 792), and *Brownell vs. Camley* (3 Duer, 9), were cited, and it was observed that, from the principles they appeared to involve, it seemed more accurate to say, that the right of a consignee in advance for his consignor to property on hand, or to a bill of lading, was a qualified property commensurate with his lien, and in support of it, and no more; that strictly, and in precision of legal language, the consignor was the owner. The consignee had a special property, adequate for various purposes of action and otherwise, but no more. It was a right to take and retain the property of another, to answer a demand. (1 Howard U. S. Rep. 712.)

On these views, the attachment of April 6, 1854, was held entitled to the preference.

4. Collection and suits.—The clauses of this section, marked 4 and 5, *ante*, are substantially re-enactments of the amendments to the former act, adopted in 1840, ch. 354, § 1.

In *Orser vs. Grossman* (11 Howard, 520), the sheriff sued Grossman to recover a debt alleged to be owing by him to W. Robinson, E. Robinson, and W. Barney. The latter were defendants in a suit in which an attachment had been issued, the plaintiffs being J. & W. H. Martin. Grossman defended, on the ground that he had never been served with the attachment and notice. The notice was, that he attached all the property which was, or might be, in Grossman's hands, without any description of such property or debt, or the amount. The notice had been left with a man in the defendant's store, and no proof given of its coming to his knowledge.

It was held to be questionable, whether a general notice that the sheriff attaches all property in the hands of the debtor of the defendant, in the attachment, is a sufficient attachment under

the Code. But it was clearly held that the service was had. Nothing warranted a service on an agent or clerk.

Willett vs. The Equitable Insurance Company (10 Abbott, 197) was a case of a suit by the sheriff, to reduce a debt to possession, which he had attached.

It is held with much strictness in some other States, that the attachment must be executed by the taking of the articles into the actual possession of the officer, or under his exclusive control. By actual custody and exclusive control is not meant, that an officer must touch and remove every article before the attachment can be deemed valid, but that the articles must be so within his power as to enable him to touch or remove them (*Oderme vs. Cilley*, 2 N. Hamp. Rep. 66; *Tainter vs. Williams*, 7 Conn. Rep. 271).

Section 233.

Claims by third persons.

“Proceedings in case of perishable property or vessels:

1. “If any property so seized shall be perishable; or,
2. “If any part of it be claimed by any other person than such defendant; or,
3. “If any part of it consist of a vessel, or of any share or interest therein, the same proceedings shall be had in all respects as are provided by law upon attachments against absent debtors.”

1. Perishable property—sale.—As to perishable property, the provision of the statute is found in the ninth section (2 R. S. 4, § 9), and is as follows:—“If any of the property so seized, other than vessels, be perishable, the sheriff shall sell the same at public auction, under an order of the officer who issued the warrant, and shall retain in his hands the proceeds of such sale, after deducting his expenses to be allowed by such officer, which proceeds shall be disposed of in the same manner as the property so sold would have been if it had remained unsold.”

Vessels—sale.—If no claim be made on behalf of the owners of a foreign or domestic vessel¹ in thirty days after seizure upon

¹ As to which, see next subdivision.

attachment, the vessel, or any share thereof attached, may be sold under an order to be made by the attaching officer, and upon the application of an attaching creditor, or of an owner or his agent.¹

Whenever a sale of any perishable property or of any vessel, or share of a vessel, shall be ordered by any officer, as herein authorized, he shall in such order prescribe the time, place, and notice of such sale, and how the same shall be published.

2. Vessels—claim of other persons.—"When a vessel belonging to any port or place in this State, or any of the United States, or any share or any interest in such vessel, shall be attached—on the application, within thirty days thereafter, of any person claiming such vessel or share, or of his agent, the officer who issued the warrant may cause the vessel or share so seized to be valued by three indifferent men, to be appointed by such officer." (2 R. S. 5, § 13.)

"Within two days after such appraisement shall be made, the claimant, or his agent, may execute a bond, with sureties to be approved by such officer, to the people of the State, in a penalty double the amount of such appraised value, conditioned that, in a suit to be brought on such bond, the claimant will establish that he was the owner of such vessel or share at the time of the seizure; and, in case of his failure to do so, that he will pay the amount of such valuation, with interest from the date of the bond [*to any trustee who may be appointed on such attachment*], or if none be appointed, or such attachment be discharged, to such debtor, or his personal representatives." (Ibid., § 16.)

The clause italicized and between brackets is inapplicable under the Code. It may be suggested whether the substituted bond should not be *to pay to the sheriff, his successors or assigns*. He seems to have the legal title in and right of possession to the vessel, or proceeds, or the right in a bond, until the warrant is fully executed or discharged under section 242. He seems, under the Code, to stand in the place of the Trustees under the act.

"Upon such bond being executed and delivered to such officer, he shall order the vessel or share so seized to be discharged

¹ 2 R. S. 7, §§ 26, 27; see *Ready vs. Steward*, 1 Code Rep. N. S. 300.

from the attachment, and the sheriff shall discharge such vessel or share accordingly." (2 R. S. 5, § 15.)

By section 16, the trustees, if appointed under the act, shall immediately commence an action on the bond; if none be appointed, or the attachment be discharged, the debtor may do so; and, by section 17, the claimant may give in evidence, in bar of a recovery, that he was the owner of the vessel or share seized at the time of issuing such warrant. If he fail to establish such ownership, or if judgment shall pass against him by default or on demurrer, the party prosecuting such suit shall recover the amount of the valuation of the vessel or share, with interest from the date of the bond, to be assessed as damages.

There is also a series of provisions respecting foreign vessels, which it is not deemed necessary to state.

3. Claim by other parties.—"If any goods or effects seized as the property of the debtors, other than vessels, shall be claimed by or on behalf of any other person as his property, the sheriff shall summon and swear a jury to try the validity of such claim in the same manner and with like effect as in cases of seizure under execution." (2 R. S. 4, § 10; 1 R. S. 767, 2d ed.)

If, by their inquisition, the jury find the property of the goods and effects so seized to be in the person so claiming them, the sheriff shall forthwith deliver them to the claimant or his agent, unless the attaching creditor shall, by bond, with sufficient sureties, indemnify the sheriff for the detention of such goods and effects. In case of such indemnity, the sheriff shall detain such goods and effects to be disposed of as hereinafter directed. (2 R. S. 4, § 11.)

In *The People ex rel. Kellogg vs. Schuyler* (4 Comstock, 173), overruling the decision in *5th Barbour*, 168, a sheriff, acting under an attachment, had seized the goods claimed by a third party, and detained the same, on being indemnified; and a jury called upon the claim, found in favor of the claimant. It was held, that the sheriff and his sureties could be sued upon his official bond, after an execution in a suit of trespass against him had been returned unsatisfied.

If the property in such goods be found to be in the claimant, the costs and charges arising from such inquisition, to be allowed by the officer issuing the warrant, shall be paid by the attaching

creditor; but if it be found to be in the debtor, then the costs and charges, to be ascertained in the same manner, shall be paid by the claimant. (2 R. S. 4, § 12), as amended by act of 1841, ch. 297.

If the garnishee himself claims the property it is not, I believe, settled what is the proper course of proceeding. It may be that an inquisition may be had under the provision of the Revised Statutes cited. It may also be that, upon his examination under section 236, the court may decide the matter in a plain case, or make an order of reference under section 271, sub. 3. Of course, wherever the property has been actually seized by the officer, and taken out of possession, the ordinary remedy by action against him may be had.

In Pennsylvania, there is a *scire facias* issued to the garnishee after execution, to which he may plead *nulla bona*. (Sergeant on Attachments, p. 22.)

In Maryland, he appears on the return of the warrant, and may plead what the defendant could plead, as well as *nulla bona*.¹

When the property is claimed by another person who has possession, the sheriff may require indemnity from the applicant before seizing the goods; and he may sustain an action upon the bond given him for any costs he has been put to in defending an action brought against him by the claimant.²

Defence of a fraudulent transfer.—It was made the subject of two contradictory decisions, whether the sheriff who has taken property under an attachment which is claimed by an assignee, may set up fraud in such assignment.

In *Hall vs. Stryker* (9 Abbotts' Rep. 342; 29 Barbour, 105), the Supreme Court in the second district held, that the sheriff could not set up such a defence where the transfer and delivery of the goods, under a bill of sale, had been consummated before the warrant issued. He was not at liberty to question its *bona fides*.

In *Thayer vs. Willett* (9 Abbott, 325; S. C. 5 Bosworth, 344),

¹ *Wever vs. Baltzell & Davison*, 6 Gill & Johnson, 335; *Stone vs. Magruder, &c.*, 3 Harris & McHenry, 552.

² *Chamberlain vs. Bellers*, 18 N. Y. Rep. 116.

the Superior Court of New York held a contrary doctrine. The attachment in that case was on the ground of an assignment or disposition of property with a view to defraud creditors. But the reasoning and principles, perhaps, tend to prove that it would make no difference on what ground the attachment was obtained. It is the legal lien which creates the right to impeach the transfer.

Section 234.

*“Interest in corporations or associations [and property]
liable to attachment.”*

“The rights or shares which such defendant may have in the stock of any association or corporation, together with the interests and profit thereon, and all other property in this State, of such defendant, shall be liable to be attached and levied upon, and sold to satisfy the judgment and execution.”

This has remained unaltered since 1849.

It may be stated, as a rule, that all property which is subject to execution may be taken on an attachment; but we see that shares or rights in stocks of companies may be attached, which cannot be reached by an execution. (2 R. S. 366.)

In *Coddington vs. Gilbert* (5 Duer's Rep. 74, affirmed 17 N. Y. Rep. 489), the action was brought against the defendants for willfully withholding from the sheriff certain bonds of the Maysville and Lexington Company. The bonds had been delivered to an agent of the defendants, in New York, for the purposes of sale, to repay themselves \$60,000, advanced for the company. The plaintiff sued the company, procured an attachment to be issued against it, and the officer served it upon the defendants. After this, the company paid the defendants the amount of their advance, and the bonds were re-delivered. These bonds, it was held, were in no sense property of the company, liable to be seized on attachment or execution. If they had been the notes or bonds of an individual, intrusted to his agent for a similar purpose, no such experiment would probably have been tried. They were no more liable to be seized in conse-

quence of being made by a railroad company or other corporation.

The term, property, is defined by the Code (§ 464) to include property real and personal. Real property "is co-extensive with lands, tenements, and hereditaments (§ 462); and personal property" includes money, goods, chattels, things in action, and evidences of debt. (§ 463.)

Property in hands of a factor, &c.—If the property is in the hands of a factor or other person entitled to a lien upon it, no creditor can attach it, or the produce of it, without discharging the lien. They who attach cannot have a larger right to it than the party whose property it is alleged to be, possesses.¹

In *Brownell vs. Carnley* (3 Duer, 9), it was held that, although the remaining interest of a consignor in goods in the hands of a factor who had made advances may be attached by the notice under section 235, yet the goods themselves could not be seized; and, if the sheriff took them, he was a trespasser, and an action would lie against him.

This decision, I apprehend, qualifies the proposition in *Giles vs. Nathan*, before cited. The attachment affects the remaining interest without payment of the lien. The goods cannot be taken without discharging it.

Partnership, or joint property.—The point, whether partnership property can be taken upon an attachment against one of the partners for his own debt, has been differently decided in various cases. They are examined in the late case of *Goll vs. Hinton* (8 Abbotts' Rep. 120); and the General Term of the First District held, that the goods of the firm may be taken, and an order of restoration was vacated. An attachment as regards chattels, differs in nowise from an execution as to the rights and duties of the officer in relation to the seizing of property. Upon an execution, the goods of a firm could be taken (*Scrughan vs. Carter*, 12 Wendell, 127), and the analogy must prevail. Yet it deserves consideration that the execution goes against joint property by force of a positive statute.

Debt not due.—When a debt is acknowledged to exist, but the time of payment has not arrived, the settled English rule ap-

¹ *Giles vs. Nathans*, 5 Taunton, 558.

pears to be, to permit the creditor to attach the bond, bill, or note, and judgment may be had against the garnishee for the amount, but execution cannot be awarded until the debt becomes due.¹

Contingent debt.—In the *Baltimore and Ohio Railroad Co. vs. Gallashue* (14 Grattan, 403), under the Virginia statute, wages for work done was, by contract, made payable on the twentieth of each month, yet could be forfeited for several causes. An attachment on the 14th of a month was not available, for the debt would not become absolute until the 20th.

See, also, *Baltimore and Ohio Railroad Co. vs. McCullough*. (12 Grattan, 595.)

In *Bates vs. The New Orleans Railroad Co.* (4 Abbott, 72), a foreign corporation contracted with a manufacturer for articles to be delivered at New Orleans, the corporation to pay the cost of transportation. The articles were made within the State, and delivered to an express company, to be carried to New Orleans. Held that the goods could not be attached as the property of the company during their transit. There was no title acquired until delivery and payment. It was but a contract of sale.

There was also a claim of the following nature: The defendants had sold certain State bonds to Hoge & Co., under an agreement that, if they produced over a certain sum, the surplus should be paid to the defendants. It was held that, even while the contingency lasted, it was not a debt which could be made the subject of an attachment.

Besides, contracts and debts were to be treated as having no *situs* or locality, but as following the person of the creditor, who was out of the State.

A debt due by a foreign corporation, which had no agency in this State, to a person a non-resident of this State, cannot be attached in an action by a third person against such non-resident.²

By the law of 1849 (chap. 107), a suit may be brought against a foreign insurance company upon any contract made or delivered within this State. In *Burns vs. The Provincial Insurance*

¹ Locke on Attachment, p. 28 and cases, especially *Robins vs. Robins*, 1 Siderfin, 327. See, also, *Stewart vs. West*, 1 Harris & Johnson, 536.

² Willett vs. The Eq. Ins. Co., 10 Abbott, 193, cited ante, p. 436.

Company, an insurance company located in Canada, it was held that, although the case was not within the strict reading of section 427 of the Code, the Act of 1849 would sustain an attachment issued in such an action.

Section 235.

“Attachment, how executed on property incapable of manual delivery.”

“The execution of the attachment upon any such rights, shares, or any debts, or other property incapable of manual delivery to the sheriff, shall be made by leaving a certified copy of the warrant of attachment with the president or other head of the association or corporation, or the secretary, cashier, or managing agent thereof, or with the debtor or individual holding such property, with a notice showing the property levied on.”

This has remained without change since 1849.

The goods of a debtor are no more bound by an attachment under the Code, before its actual service, so as to defeat the title of a purchaser in good faith, than as against such a purchaser they are bound by an execution before an actual levy. (5 Duer, 250.)

Where goods were in the custom-house with the duties unpaid, the sheriff cannot require a manual delivery; but a notice showing the property levied on, and a certified copy of the warrant served upon the collector, and the consignees of the goods, would be sufficient. (*Rukman vs. Orser*, 5 Duer, 242; *Brownell vs. Carnley*, 3 Duer, 9.)

The attachment against a consignee cannot be executed in any other manner, when he has a title by the bill of lading or otherwise, and a lien for advances. The goods themselves cannot be taken from him.

The notice which is to be served with the warrant must particularly describe the property, so as to enable the party holding to identify it, and to deliver it or its proceeds to the officer, when released from his own claim.

It must be as definite as, and correspond with, the inventory which the sheriff is directed to make. (*Rukman vs. Orser*, 5 Duer, 242.)

An attachment of a debt owing by a party is not properly served, by leaving a copy of the warrant and a notice, at the place of business of the alleged debtor, with a third person found there. There should be personal service upon him of a copy of the warrant, and a notice. (*Orser vs. Grossman*, 4 E. D. Smith, 443.)

In *Russell vs. Ruchman* (3 E. D. Smith, 419) an action was brought upon a promissory note made by the defendant and another person, in favor of the plaintiff. During the suit, which was in the Marine Court, the defendant assigned a claim which he had against the plaintiff to one Drury, who sued upon such claim in the Supreme Court, and issued an attachment against the plaintiff as a non-resident. The sheriff demanded the note of the plaintiff's attorney, and, on refusal to deliver it, gave him written notice of the attachment and demand. The defendant in the Marine Court set up, in a supplemental answer, the attachment and notice, as a defence.

It was held "that the proceedings of the sheriff constituted a valid levy. The copy of the warrant and notice, showing the property levied upon, was sufficient. It was not necessary, in cases of notes or other evidences of debt, that there should be actual possession by the sheriff.

"The proceedings of attachment could not be pleaded as a bar to the action. The action was not defeated by the levy. Payment to the sheriff of the amount of the note, might have been available."

It seems to be an opinion that an attachment served fixes itself upon any property which may be in the party's hands, although no specification of it is made, or any notice enumerating it is given.

The notice used by the sheriff of the county of New York is to the effect that he attaches all property of the said A. B. in the hands of the party on whom it is served, or which may thereafter come to his hands.

In *Lyman vs. Cartwright* (3 E. D. Smith, 117) much doubt was expressed whether, when property incapable of manual de-

livery is attached, the mere service of a copy of the warrant, without making and returning an inventory under section 232, and without the notice prescribed by section 235, was sufficient.

In *Orser vs. Grossman* (11 Howard, 520; 4 E. D. Smith, 443) this doubt is again expressed, and the sections of the Code referred to.

In *Rukman vs. Orser*, before cited, the necessity of the specification was distinctly ruled.

Many provisions of the Code do undoubtedly appear to contemplate specific property to be fastened upon by the attachment, and nothing else.

The 231st section declares the requisition upon the sheriff to be, that he shall attach and safely keep all the property of the defendant within his county, or so much as shall be sufficient to pay the demand. By section 232 he is to make and return an inventory. The 233d section speaks of the property seized being perishable. And after thus indicating actual possession of what is tangible, the 235th section provides for a service in other cases, by leaving a copy of the warrant, with a notice showing the property levied on. Thus a specification, and possession actual or constructive, seems in all cases contemplated. If this view is correct, it then seems difficult to imagine of what effect the clause introduced into the notice by the sheriff of New York can be. That the warrant remaining in the officer's hands, will justify fresh notices when fresh property is discovered, was before suggested, and seems a sound proposition; but it would appear that otherwise other property would remain subject to the debtor's disposition, and unaffected by the warrant.

In several of the other States the attachment by express provision operated to bind property subsequently coming to the garnishee's hands.

This is the law in Pennsylvania, in the case of domestic attachments, which do inure to the benefit of all the creditors. All the estate attached, or afterwards discovered by the trustees, vests in them.¹

And under this, the important case of *Jackson vs. The Bank of the United States* (10 Penn. State Rep. 61) settled, that where

¹ Dunlop's Ed. Laws, p. 740—746.

the bank had been summoned as garnishee, and the debtor then deposited monies in it to his own credit, which he subsequently drew out, the bank was responsible. And this, although the jury found that he deposited the funds as agent merely, and they all belonged to other persons.

The usual course of proceeding in the Lord Mayor's Court of London is fully set forth in *McDaniel vs. Hughes* (3 East's Rep. 306). The plea put in by the garnishee to what is termed a warning to appear and show cause, was that he, at the time of making the attachment, or at any time since, had not owed to, or detained from, the defendants in the said attachment suit the sum attached, or any part thereof. Execution was had of the amount attached.

The defendants in that action were plaintiffs in the present, and sued the garnishee. Among other points one was taken, that the garnishee had not, in fact, received the plaintiffs' money when the attachment issued. An authority was cited, but Lawrence, Justice, said that was contradicted by Savage's case (1 Salkeld, 291). The Common Sergeant, as *amicus curiæ*, stated that it was common practice, if property came into the garnishee's hands before plea pleaded, it was liable to be attached.

The *Privilegia Londini* was cited, which is very express to the point.

The court in the course of the argument intimated much doubt upon the question, and in the judgment declare that on that record it was unnecessary to pass upon it.

It would seem wholly inconsistent with the rule before stated as prevalent in several other States, of the absolute necessity of a possession or exclusive control by the officer to give validity to an attachment, that this should be sufficient, see *ante*, § 232.

Section 236.

"Certificate of defendant's interest to be furnished by corporations.

"Whenever the sheriff shall, with a warrant of attachment, or execution against the defendant, apply to such officer, debtor, or

individual, for the purpose of attaching or levying upon such property, such officer, debtor, or individual shall furnish him with a certificate under his hand, designating the number of rights or shares of the defendant in the stock of such association or corporation, with any dividend or any incumbrance thereon, or the amount and description of the property held by such association, corporation, or individual, for the benefit of, or debt owing to, the defendant.

“If such officer, debtor, or individual refuse to do so, he may be required by the court or judge to attend before him, and be examined on oath concerning the same; and obedience to such orders may be enforced by attachment.”

This section has remained unaltered since its enactment in 1849.

This provision appears intended to cover the cases, and provide the mode in which the party in whose hands property is attached may appear and set up any defence to the claim upon the property supposed to be in his possession.

Under the English attachment law, the garnishee, as he is termed, is brought in by a summons, and may appear and plead specially that the court has no jurisdiction of the subject, or that he has nothing of the defendant's in his hands, or other special matter.¹

In Maryland, the course is, that the garnishee may be required to answer, upon oath, written interrogations touching the property of the defendant in his possession or charge. A judge grants a warrant to the clerk to issue the attachment. This is accompanied with a *capias* for the defendant, and a declaration or short note of the cause of action delivered to the sheriff, and which he is to put up on the court-house door. On the return of the attachment the garnishee may appear and show cause why the goods should not be held. He may plead whatever the defendant could plead, and also that he has no goods.

Non assumpsit and *nulla bona* were plead in the cases of *Beeltzell vs. Dawson* (6 Gill & John. 335) and *Stone vs. Magruder* (10 *ibid.* 383).

¹ 17 Queen's Bench Rep. 187, 202, 213.

In Pennsylvania, the system was adopted at an early day, in analogy to the custom of London. The attachment was served upon the garnishee, and the plaintiff may, if he think fit, file interrogatories for his examination touching the property in his hands. But here, it seems, the proceedings as to him cease, until judgment against the debtor. Then a *scire facias* issues, commanding the garnishee to appear and show cause why the plaintiff should not have execution against him of the property attached in his hands. (Sergeant Law of Attachment, pp. 22, 96.) The garnishee might plead *nulla bona*, a prior attachment, &c.

The present statute was passed in 1836,¹ and, with many changes, retains the practice of summoning persons indebted, and examining them.

In Hoagland *vs.* Stodell (1 Code Rep., N. S. 210) the sheriff served an attachment on R., alleged to be a debtor of the defendant, and demanded a certificate. He certified having in his hands \$75, and the plaintiff obtained an order for his examination. The order was held to be invalid; it could not be allowed when a certificate had been given. The remedy was by action.

In Carroll *vs.* Finley (26 Barbour, 61) the parties upon whom an attachment was served gave a certificate to the sheriff that they had no property of the defendant in their hands. An order was made at Special Term vacating an order for the examination of the parties. On appeal, it was held that the order was right. But the majority of the court held that the plaintiff might impeach the verity of the certificate. He might establish to the satisfaction of the judge, by the former admissions of the party, that the certificate was untrue. This might be regarded as a refusal to give the certificate. Judge Mitchell said: "There must be proof of the party being a debtor to the defendant, or having property of his. Of this there was not proof when a party certifies he has nothing, and this is met only by information and belief that he has."

The same learned judge held, in Hopkins *vs.* Snow (4 Abbott, 368), that a certificate furnished under this section, stating the amount and description of property possessed, was conclusive, and no examination could be allowed. But when the certificate

¹ Dunlop's Ed. of the Laws, pp. 740, 746, 757.

was, that he held no property, and an affidavit was produced of a previous admission of having held such property, the order for his examination was made.

The powers which are given to the sheriff to collect all debts and effects, and to take all legal proceedings necessary for such purpose under section 232, and the authority to the plaintiff in section 238, prove that the plaintiff has other and effectual modes of proceeding besides that under this provision. Hence it was stated by Justice Mitchell, in *Hopkins vs. Snow*,¹ that the course of such an examination must be governed by the same rules as an examination of third persons upon supplementary proceedings. (§ 294.) Its office is only to ascertain what the third person admits belongs to the judgment debtor.²

It would seem that the Legislature, in this provision, had in mind the provisions of the statute of February 21, 1848, chapter 53, and the act of April 11, 1842, which it amends, relating to a certificate to be given by the officer of a foreign corporation. The second section of that act of 1848 adopts the course of proceeding under the 12th, 13th, 14th, 15th, and 16th sections of the Revised Statutes (Art. 8, Title 1, Ch. 5, Part 2, 2 R. S. 43, 44) relating to the mode of examining non-resident debtors, or persons indebted to non-resident debtors, or having property of such debtors. Those sections contain nothing warranting any inquiry by witnesses or otherwise, other than the mere examination of the alleged debtor. Certainly, however, they permit the most minute interrogation "touching the indebtedness to the debtor" (§ 13); and section 19 compares the inquiry to a bill of discovery in chancery.

It may be observed, that if the court is at liberty in any case to order an examination after a certificate of *no property*, it is difficult to see why it may not equally do so, to question the truth of a certificate as to the possession of a given amount of property.

In the case of *Beebee vs. Rogers*,³ a party upon whom notice of an attachment was served on the 26th of October, gave a certificate that he had no property of the debtor, dated that day. An affidavit was made of his having admitted, on the 21st of October,

¹ *Ut supra*.

² 12 Howard, 139; *ibid.* 459; 1 Code Rep. N. S. 77.

³ Special Term Superior Court, Nov. 3, 1859.

that he had purchased goods of the defendant and owed him for them. The order to examine him was granted.

In *Schieb vs. Baldwin* (13 Abbotts' Rep. 469) it was ruled, that a party was not bound to give a certificate, unless he was apprised by the sheriff that he had an attachment against the defendant.

It was also held, in the same case, that an attachment could not be served, and the certificate demanded, after judgment in the action.

Section 237.

" Judgment, how satisfied.

" In case judgment be entered for the plaintiff in such action, the sheriff shall satisfy the same out of the property attached by him, if it shall be sufficient for that purpose,—

" 1. By paying over to such plaintiff the proceeds of all sales of perishable property, and of any vessel, or share or interest in any vessel, sold by him, or of any debts or credits collected by him; or so much as shall be necessary to satisfy such judgment.

" 2. If any balance remain due, and an execution shall have been issued on such judgment, he shall proceed to sell, under such execution, so much of the attached property, real or personal, except as provided in subdivision four of this section, as may be necessary to satisfy the balance, if enough for that purpose shall remain in his hands; and in case of the sale of any rights or shares in the stock of a corporation or association, the sheriff shall execute to the purchaser a certificate of sale thereof, and the purchaser shall thereupon have all the rights and privileges in respect thereto which were had by such defendant.

" 3. If any of the attached property belonging to the defendant shall have passed out of the hands of the sheriff without having been sold or converted into money, such sheriff shall repossess himself of the same, and for that purpose shall have all the authority which he had to seize the same under the attachment; and any person who shall willfully conceal or withhold

such property from the sheriff shall be liable to double damages, at the suit of the party injured.

“4. Until the judgment against the defendant shall be paid, the sheriff may proceed to collect the notes and other evidences of debt, and the debts that may have been seized or attached under the warrant of attachment, and to prosecute any bond he may have taken in the course of such proceedings, and apply the proceeds thereof to the payment of the judgment.

“At the expiration of six months from the docketing of the judgment, the court shall have power, upon the petition of the plaintiff, accompanied by an affidavit setting forth fully all the proceedings which have been had by the sheriff since the service of the attachment, the property attached, and the disposition thereof, and also the affidavit of the sheriff that he has used diligence and endeavored to collect the evidences of debt in his hands so attached, and that there remains uncollected of the same any part or portion thereof, to order the sheriff to sell the same, upon such terms and in such manner as shall be deemed proper. Notice of such application shall be given to the defendant or his attorney, if the defendant shall have appeared in the action. In case the summons has not been personally served on the defendant, the court shall make such rule or order as to the service of notice and the time of service as shall be deemed just.¹

“When the judgment and all costs of the proceedings shall have been paid, the sheriff, upon reasonable demand, shall deliver over to the defendant the residue of the attached property, or the proceeds thereof.”

In 1849, the section was enacted as it now stands, with the exception of the clause now made part of the fourth subdivision, beginning with the words “at the expiration of,” and ending with the words “deemed just.” This clause was adopted by the amendment which went into effect May 6, 1859.

In *McKay vs. Harrower* (27 Barbour, 463) it was held that, if the sheriff had the goods when an execution was delivered to him, it was all that the plaintiff could require. The sheriff was then to proceed and sell on the execution. If he had ceased to be sheriff when the execution was issued, it should yet be di-

¹ Amendment of April 16, 1859. Laws, p. 968.

rected to him, and not to his successor. It would be special, reciting the attachment, the taking of the property, and directing him to sell the property of the defendant generally. He cannot be placed in default until such execution is put into his hands. He is not required to deliver the property to his successor. (2 R. S. 438, § 69, subd. 5.)

In *McBride vs. The Farmers' Branch Bank* (7 Abbotts' Rep. 347) an attachment was levied upon moneys in The Ohio Life and Trust Company, where it remained until the company failed. It was decided that the money was not at the risk of the creditor. The defendants could have given security and discharged the attachment, or could have applied to the court equally with the plaintiffs for an order directing the sheriff to collect the debts attached by him. The debt was lost by a delay caused by their own unavailing defence.

Section 238.

"When action to recover notes, &c., of defendant, may be prosecuted by plaintiff in the action in which the attachment issued.

"The actions herein authorized to be brought by the sheriff may be prosecuted by the plaintiff, or under his direction, upon the delivery by him to the sheriff of an undertaking executed by two sufficient sureties, to the effect that the plaintiff will indemnify the sheriff from all damages, costs, and expenses on account thereof, not exceeding two hundred and fifty dollars in any one action. Such sureties shall, in all cases, when required by the sheriff, justify by making an affidavit that each is a householder, and worth double the amount of the penalty of the bond, over and above all demands and liabilities."

This section, adopted in 1849, has remained unaltered since.

It is presumed that such an action may be prosecuted in the name of the plaintiff, as the real party in interest, and it would seem advisable to state in the complaint, the suit, attachment, and proceedings under it, with the giving of the undertaking.

In the case of *Russell vs. Ruckman* (3 E. D. Smith, 419) the defendant Ruckman had given his promissory note to the plaintiff, who had sued upon it. One Drury issued an attachment against the plaintiff as a non-resident, in an action brought by him, and the sheriff attached the note. The defendant set up this attachment by supplemental answer as a defence. This was held wrong. The 121st section of the Code was express in saying that the action should be continued in the name of the original party, but the court may substitute the party to whom the claim has been transferred after the action has been commenced. The sheriff might have applied to the court to be substituted as plaintiff, or he might have claimed to continue the action in the name of Russell. The defendant, if desirous of paying the debt, might perhaps have applied to the court to stay proceedings until the sheriff was substituted.

Section 239.

“Bond to sheriff on attachment—how disposed of on judgment for defendant.”

“If the foreign corporation, or absent or absconding or concealed defendant, recover judgment against the plaintiff in such action, any bond taken by the sheriff, except such as are mentioned in the last section, all the proceeds of sales and moneys collected by him, and all the property attached remaining in his hands, shall be delivered by him to the defendant, or his agent, on request, and the warrant shall be discharged, and the property released therefrom.”

This section has remained unaltered since its adoption in 1849.

Section 240.

“Discharge of attachment, and return of property or its proceeds to defendant, on his appearance in action.”

1. “Whenever the defendant shall have appeared in such action, he may apply to the officer who issued the attachment, or to the court, for an order to discharge the same; and if the

same be granted, all the proceeds of sales and moneys collected by him [*the sheriff*], and all the property attached remaining in his hands, shall be delivered or paid by him to the defendant or his agent, and released from the attachment.

2. "And where there is more than one defendant, and several property of either of the defendants has been seized by virtue of the order of attachment, the defendant whose several property has been seized may apply to the officer who issued the attachment for relief under this section."

[1] The provision marked 1 has remained unchanged since its adoption in 1849. In 1862 the clause marked 2 was adopted.

The last clause of the amendment to section 241, made in 1857, should be noticed in connection with this section. "In all cases the defendant may move to discharge the attachment, as in the case of other provisional remedies."

The application may, of course, be made upon the ground of any defect in the affidavit on which the warrant was granted, or its insufficiency. It was once questioned whether this could be made except before the judge who granted the warrant. But this doubt was, I think, overruled before the amendment of 1857. (*Furman vs. Waller*, 13 Howard, 348.)

It was considered proper by one of the justices of the Superior Court, that the discharge should not be made without notice, or an order to show cause, even when an undertaking was given under section 241.¹ In the case referred to, an important question as to co-defendants being sureties was raised upon such an order.²

Notwithstanding the apparently positive language of the 241st section, it was held before the amendment of 1857, that the motion could be granted upon merits without the undertaking.³ By the amendment of 1857, the defendant may move to discharge the attachment, as in the case of other provisional remedies.

The amendment of 1857 has, it is presumed, settled the question, much controverted, whether, upon a motion to discharge an

¹ *Mortimer vs. Brunner* and others, Sept. 6, 1859. Hoffman, Justice.

² See *post*, note to section 241.

³ *Killian vs. Washington*, 2 Code Reporter, 78.

attachment, affidavits on the part of the defendant could be used, and further supporting affidavits on the part of the plaintiff.¹ It is presumed that the rule laid down in sections 205 and 226 would now prevail. See *ante*, tit. Arrest and Bail, § 205.

At any rate, it is the settled course, in the Superior Court of New York, to admit them.²

[2] The addition of April, 1862, enables each of several defendants to move as to his own several property, as if he were the only defendant. I have not yet met any judicial decision upon it.

Section 241.

“Undertaking on the part of the defendant.”

1. “Upon such application, the defendant shall deliver to the court or officer an undertaking, executed by at least two sureties, *who are* residents and freeholders, *or householders*, in this State, approved by such court or officer, to the effect that the sureties will, on demand, pay to the plaintiff the amount of judgment that may be recovered against the defendant in the action, not exceeding the sum specified in the undertaking, which shall be at least double the amount claimed by the plaintiff in his complaint.

2. “If it shall appear by affidavit that the property attached be less than the amount claimed by the plaintiff, the court or officer issuing the attachment may order the same to be appraised, and the amount of the undertaking shall then be double the amount so appraised.

3. “And in all cases the defendant may move to discharge the attachment, as in the case of other provisional remedies.

4. “And where there is more than one defendant, and several

¹ Conklin *vs.* Dutcher, 5 Howard’s Pr. Rep. 386; Niles *vs.* Vanderzeer, 14 Howard, 547; Lansingburgh *vs.* McKee, cited *ibid.*; N. Y. & Erie Bank *vs.* Codd, 11 Howard, 221; Granger *vs.* Schwartz, Superior Court, N. Y., 11 Legal Obs. 346; St. Amand *vs.* Beixcedon, 3 Sandf. 703.

² Barry *vs.* Bokover, April, 1858, 6 Abbott, 374; Potter *vs.* Ritcher, *ibid.* 374, n.; Chain *vs.* Wilson, 16 Howard, 552; 1 Bosworth, 673; 8 Abbott, 88; St. Amand *vs.* Beixcedon, 3 Sandf. S. Ct. Rep. 703.

property of either of the defendants has been seized by virtue of the order of attachment, the defendant whose several property has been seized may deliver to the court or officer an undertaking, in accordance with the provisions of this section, to the effect that he will, on demand, pay to the plaintiff the amount of judgment that may be recovered against such defendant. And all the provisions of this section applicable to such undertaking shall be applied thereto."

The Code, until 1857, contained only the provision in the above first subdivision of this section. The words italicized were not in it. Those words, and the whole of the second and third subdivision, were added by the amendment of the 17th of April, 1857. The 4th was added in April, 1862, taking effect the 13th of May.

1. Undertaking.—It has been held that co-defendants jointly liable upon the demand in suit, and who were residents, were not disqualified from being sureties in the undertaking. The language of the Code permitted it; and nothing was stated against the solvency of the other parties, or of the firm. It was, after all, the interest of the non-resident in the firm property which was thus sequestrated.¹

Of course, the undertaking need not be executed by the debtor.

It has been held that when an undertaking was given under this section on discharging an attachment, and one of the sureties became insolvent, the court had no power to order additional sureties to be given.² The case of *Bettshover vs. Wheaton* (15 Howard, 310) was referred to, where a similar decision was made in relation to an undertaking on an appeal. By an amendment of 1859 to section 335, new security may be obtained in case of insolvency of parties in appeal undertakings. No similar provision has been made for other cases.

2. Appraisement.—In *Spencer vs. The Rogers Locomotive and Machine Works* (Superior Court Chambers, Sept., 1861—Hoffman, Justice), a question arose, under this section, how the

¹ *Mortimer vs. Brunner and others*, Chambers, Sept. 6, 1859—Hoffman, Justice.

² *Dudley vs. Goodrich*, 16 Howard, 189.

property taken was to be appraised, when an affidavit was made of its being of less value than the demand. The order was, "that an inventory and appraisement of the property be made under the 241st section of the Code, by the Sheriff of the City and County of New York, with the assistance of two disinterested freeholders, notice of the time and place thereof being given to the attorney of the plaintiff."

The reasons for the order were these: The Code directs that the court or officer may order the property to be appraised, not pointing out any manner of doing so. The Revised Statute, "of attachments against absconding, &c., debtors (2 R. S. 2), directs, in section 8, that the sheriff, immediately on making the seizure, with the assistance of two disinterested freeholders, make a just and true inventory of all the property so seized, stating therein the estimated value of the several articles of personal property." Under sections 468, 469, this practice may be resorted to for making an appraisement.

It might very well be, however, that an order of reference could be made under the third subdivision of section 271 of the Code.

It has been held that the party cannot apply under this section after judgment, although he has appealed. In *Spencer vs. The Rogers Locomotive and Machine Works* (Superior Court, Sept. 10, 1861), the judge said: "The theory of a provisional remedy is, that it gives some intermediate and conditional protection and assistance before a judgment has defined the rights of the parties. The judgment in the present case, although appealed from, is a perfect, absolute judgment, as if affirmed in the highest court; but its enforcement is arrested by the appeal. In the case of an arrest, the application for an order must be made before judgment (§ 183); of claim, and delivery before answer (§ 206); and of an injunction before judgment (§ 220). The motion to set aside an injunction must be made before trial (§ 225); upon claim and delivery, the defendant may get back the property before its delivery to the plaintiff. The language of section 240 admits of a construction under which the present motion might be made after judgment. On the contrary, the form of the undertaking prescribed in the 241st section implies a future anticipated judgment.

“The 232d section directs the sheriff to keep the property seized, or the proceeds of what may have been sold, to answer any judgment which may be obtained in the action. By the 227th, the property attached is to be as security for the satisfaction of such judgment as the plaintiff may recover. By the 237th section, in case judgment be entered for the plaintiff, the sheriff shall satisfy the same out of the property attached by him, by paying over the proceeds of any sales made by him, and the avails of any credits collected by him ; and, if execution has issued, by selling any other attached property. ‘When the judgment and all costs shall have been paid, the sheriff, upon reasonable demand, shall deliver over to the defendant the residue of the property attached, or the proceeds thereof.’

“These provisions show quite clearly that, after judgment for the plaintiff, the lien had become consummated, and the right to satisfaction out of the specific property established, though satisfaction is suspended by the appeal ; so that it becomes equivalent to an execution actually levied. No such thing is known in the law as a re-delivery of property levied upon when an appeal stays further proceedings in the case. I am of opinion that the motion to discharge the attachment must be denied.”

Any collusion with the debtor and an attaching creditor to keep the property from the effect of another attachment, is good ground to vacate the first.

In *Reed vs. Ennis* (4 Abbotts' Rep. 393), H. issued an attachment, which was levied upon joint property of the debtor and his partner. The debtor then, with his copartner, gave a confession of judgment to Reed, and thus to get a priority. The confession was set aside as fraudulent. Reed then issued an attachment on the partnership debt, and directed a levy on the same property. He then took no further steps in his action for four months, leaving his attachment dormant. The court concluded, from these and some other facts, that the attachment was levied, not to secure the debt, but to continue the hinderance and delay of H., and it was vacated.

3. Motion to discharge.—The party may move to discharge the attachment as in the case of other provisional remedies.

It is presumed that this renders applicable on such a motion all the general rules which have been adopted on motions to dis-

charge an arrest and injunction, when they are in their nature applicable.

I consider the rule to be settled, that it is only when a motion to discharge an attachment is made on affidavits on the part of the defendant, that the plaintiff can support his case by additional affidavits. (*Wilson vs. Britton*, 6 Abb. 433; Mr. Justice Bonney's statement of the rule of the Supreme Court in this district, in the case of *Dickinson vs. Benham*, 10 Abbott; 19 Howard, 410; *Dickinson vs. Benham*, 20 Howard's Pr. R. 343, General Term; *Granger vs. Schwartz*, Superior Court, 11 Legal Observer, 346.)

The last clause of section 241 of the Code was adopted in April, 1857, and provides "that in all cases the defendant may move to discharge the attachment, as in the case of other provisional remedies."

He then moves, not upon giving security, but upon the law and merits of the case. The language appears to indicate not merely that he may move, as in the case of an arrest, for example, but also that he is to move under similar rules and provisions. The rule is quite clear that, in cases of arrest or injunction, affidavits to support the plaintiff's case are inadmissible when the defendant moves on the original papers merely.

But in the case of *Dickinson vs. Benham* (20 Howard, 343) it was ruled, at General Term, that additional affidavits are admissible to show facts occurring since the original application was made; and an affidavit was there allowed to be read to show, that a general assignment of all his property had been made by the defendant.

A defendant may move to discharge an attachment, although he had made a general assignment covering the property, after such attachment was levied. And it has been held that the fact of the assignment being before the attachment would not make a difference.

In *Brewer vs. Tucker*¹ the court said: "The third and more difficult question, relates to the defendant's right to make the motion. In the affidavit on which the order to show cause was granted, it was sworn to by the defendant that, previous to the

¹ Superior Court, Special Term, Sept. 20, 1861—Hoffman, Justice.

granting of such attachment, this defendant had executed an assignment of all his property, in trust for the benefit of his creditors, to J. P. Sullivan; that said attachment had been levied upon property so assigned by this defendant to said Sullivan, and now in his possession, and the said assignee is embarrassed in the disposition of the said property by the claim of the sheriff, under said attachment, and the defendant is desirous of a speedy hearing of a motion to discharge such attachment.

"The case of *Dickinson vs. Benham* (20 Howard, 343), before referred to, is an express decision, at General Term, that the fact of the defendant having made a general assignment for the benefit of creditors after the attachment had issued, does not prevent his moving to discharge it. The case of *Furman vs. Walter* (13 Howard, 350) is cited, as deciding that only a party who is some-way injured by the process can move to discharge it; and it is held that an assignor for creditors has such a reversionary interest, if there should be a surplus, and such an interest in the appropriation of the funds as to justify his motion.

"In *Furman vs. Walter* the transfer was absolute and unconditional sale of a stock of goods.

"In the present case, the assignment was made before the attachment; but no solid distinction exists on this ground. The residuary interest is as great in the one case as in the other.

"It may be urged with force, that such an assignment operates to transfer the right of property, the possession, the exclusive dominion and control, with only a remote conditional possibility of interest in the assignor; that if the property belonging to the assignee is illegally interfered with, his mode of redress is open and available, and that to allow one who could not take possession, or exercise the least control, to interfere and remove an obstruction or apparent lien upon the property, seems anomalous. I do not feel, however, at liberty, at Special Term, to disregard so express an authority from so high a source."

Section 242.

“When sheriff to return warrant, and proceedings thereon.

“When the warrant shall be fully executed or discharged, the sheriff shall return the same, with his proceedings thereon, to the court in which the action was brought.”

There has been no change in this section since 1849.

It is to be observed, that no return day, or direction to return, is contained in the warrant, and the present section is all that applies to that subject. It would seem that the warrant may thus lie in the sheriff's hands until judgment, at least, and be executed whenever property is pointed out to him in the interval.

Section 243.

“Sheriff's fees.

“The sheriff shall be entitled to the same fees and compensation for services, and the same disbursements under this Title,¹ as are allowed by law for like services and disbursements under the provisions of Chapter five, Title one, and Part two of the Revised Statutes.”

The provisions referred to are found in 2 R. S. 3, §§ 1-6, and in 2 R. S. 646. The compensation and fees to be allowed are as follows :

“For serving an attachment against the property of a debtor, fifty cents, with such additional compensation for his trouble and expenses in taking possession of and preserving the property attached as the officer issuing the warrant shall certify to be reasonable ; and where the property so attached shall afterwards be sold by the sheriff, he shall be entitled to the same poundage on

¹ The Title 7, “Of Provisional Remedies in Civil Actions” now treated of.

the sum collected as if the sale had been made under an execution."

"For making and returning an inventory and appraisal, such compensation to the appraisers, not exceeding one dollar to each per day for each day actually employed, as the officer issuing the attachment shall allow, and the same compensation for drafting and copying the inventory as is allowed for drafts and copies to attorneys in the Supreme Court."

"For selling any property so attached, and for advertising such sale, the same allowance as for sales on executions."

The sheriff may apply to the officer to fix his compensation for trouble and expenses, without waiting to see whether the plaintiff proceeds in the action, or for its determination.¹

The Supreme Court in the First District has adopted, as a general practical rule, that the allowance at the rate of poundage upon the amount claimed shall furnish a rule of compensation, except when that amount is so large as that the allowance would be excessive. This is in the case of a settlement of the action before a sale, and when the amount claimed or property taken (which should not exceed the amount demanded) supplies the only ground for adjusting the amount.

In a case at Special Term of the Superior Court this rule was adopted. The action was compromised after an attachment had been executed upon some property. The rate of poundage on the demand was taken as the rule of compensation.²

It was held, in the same case, that the amount allowed for compensation must include the expenses. There could not be an allowance as for trouble and the sheriff be entitled also to claim his expenses. Of course, the compensation would be regulated with due regard to such expenses.

This compensation is for taking possession of and preserving the property. If a sale is afterwards made, the sheriff becomes entitled to his poundage also.

The rate of poundage is fixed by the statute at two cents and five mills per dollar on \$250, and on every dollar beyond \$250 one cent and two and a half mills. (2 R. S. 645.)

The allowance for drafting and copying the inventory must,

¹ Hoge *vs.* Tague and others, 11 Howard, 207.

² Before Hoffman, Justice, December, 1857.

it is supposed, be regulated by the fee bill in force when the Code went into effect.

The fees for advertising and selling the property are fixed by the statute. (2 R. S. 645.)

Costs and allowance.

Where the defendant was a foreign corporation, and under a warrant of attachment, the sheriff had levied upon property to the amount of \$9,000, and the suit was settled before answer, upon payment of costs to be made by the defendants; it was held that the plaintiff was entitled to an allowance under section 308 of the Code, to the full extent which could be allowed.¹

But, in *Pratt vs. Conkey* (15 Howard, 27), Justice Marvin held that the allowance could only be made upon the recovery of judgment; and, after a tender of the amount due and costs, the plaintiff could not proceed to judgment to obtain the percentage.

Brace vs. Beatty (5 Abbott, 221), cited by Justice Davies, has been reversed.²

The provision of the 308th section of the Code is, that there shall be allowed to the plaintiff, upon the recovery of judgment by him in an action for the partition of real estate, &c., or in which a warrant of attachment has been issued, the sum of ten per cent. on the recovery, as in the next section provided. And, by the 309th section, the rates shall be estimated upon the value of the property claimed or attached. In 1858, the addition was made to section 309 of the following clause. In difficult and extraordinary cases, when a trial has been had, *and* in any of the actions or proceedings specified in section 308, the court may also, in its discretion, make a further allowance to any party, not exceeding five per cent. upon the amount of the recovery, or claim, or subject-matter involved.

But, by the amendment of April 16, 1859, the word *and*, above italicized, was altered to the word *except*. The amendment of 1862 does not vary the question.

It would seem that, by the express language of the Code, no allowance could be made in cases of attachment until judgment.

¹ Davies, Justice, in *Brown vs. The Safeguard Ins. Co.*, 7 Abbott, 345.

² 7 Abbotts' Rep. 445.

The exception of cases of attachment, and the other specified cases, from the power to allow when *a trial* has been had, is strong to show that no allowance can be made but upon recovery of judgment.

It has been held that, where judgment was recovered, and an attachment had been issued, an allowance could be made, although no property was attached.¹

¹ Jackson *vs.* Figaniere, 15 Howard, 224.

CHAPTER V.

RECEIVERS.

Section 244.

“Powers of court as to receivers, deposit of money, &c., in court, and other provisional remedies. Judgment for sum admitted due.

“A receiver may be appointed—

“1. Before judgment, on the application of either party, when he establishes an apparent right to property which is the subject of the action, and which is in the possession of an adverse party, and the property, or its rents and profits, are in danger of being lost, or materially injured or impaired; except in cases where judgment upon failure to answer may be had without application to the court;

“2. After judgment, to carry the judgment into effect;

“3. After judgment, to dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or when an execution has been returned unsatisfied, and the judgment-debtor refuses to apply his property in satisfaction of the judgment;

“4. In the cases provided in this Code, and by special statutes, when a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights; and in like cases, of the property within this State of foreign corporations.

“Receivers of the property within this State of foreign corporations shall be allowed the same commissions as are allowed by law to the trustees of the estates of absconding, concealed, and non-resident debtors;

“5. In such other cases as are now provided by law, or may be in accordance with the existing practice, except as otherwise provided in this act.”

Receivers upon supplementary proceedings, under section 298, form a separate class, and are hereafter treated of.

Chapter V. of this 7th Title was, in the Code of 1849, simply as follows: "Until the Legislature shall otherwise provide, the court may appoint receivers, and direct the deposit of money, or other thing, in court, and grant the other provisional remedies now existing, according to the present practice, except as otherwise provided in this act." (§ 244, Code 1849.)

In 1851 the section was amended, and, as to receivers, was the same as at present, and, excepting the last clauses of section 1 and of section 4, with some variations of language.

In 1852 it was enacted as it now stands in relation to receivers, with the same exceptions.

In 1858 the last clause of subdivision 1, and the last clause of subdivision 4, were added. (Sess. Laws of 1858, ch. 306, §§ 20, 21.)

In 1862 the second paragraph of subdivision 4 was enacted.

SUBDIVISION 1. Before the judgment.—The first subdivision relates to a receiver before judgment, and authorizes the appointment.

The action must be commenced.—An apparent right is to be shown to the property, the subject of the action.¹ It is not essential, however, that the adverse party should have appeared in the suit to justify the appointment. A residence out of the jurisdiction, an absconding or concealment to avoid service of process, and other special circumstances, may warrant it.²

If the property is of a perishable nature, or chases in action would be in danger of being lost if not collected immediately, such a case arises.³

The general rule, however, is, that a receiver cannot be appointed until after service of process and appearance, and then upon notice, or after the time for appearing has expired.⁴

¹ 2 Duer's Supr. Ct. Rep. 632; 1 Atkyns, 578.

² Tanfield vs. Irvine, 2 Russell Ch. Rep. 149; Sandford vs. Sinclair, 8 Paige, 373; Quin vs. Gunn, 1 Hogan, 75.

³ Ibid.

⁴ The People vs. Norton, 1 Paige, 17; Gibson vs. Harris, 8 Paige, 481; Stratton vs. Davidson, 1 Russell & Mylne, 484.

“By the ancient practice of the Court of Chancery in England, a receiver was not appointed until after the coming in of the defendant's answer. This practice was first broken in upon by Lord Apsley, in *Compton vs. Bearcroft*, 1773. And it is now well settled, both here and in England, that a receiver can be appointed before answer, provided the complainant can show that he has an equitable claim to the property in controversy, and that a receiver is necessary to preserve the same from loss.”¹

Either party may apply for a receiver.—This is warranted by the next clause of this first subdivision.

It frequently occurs that a defendant requires a receiver as against a plaintiff. In the settlement of partnership accounts, if a survivor be plaintiff, even his legal title may be interfered with on sufficient grounds. In *Pelletrau vs. Frelinghuysen* and others (4 Paige, 204), a defendant, in a bill to redeem, applied for a receiver, which was granted, unless certain terms were complied with.

And although it has been said that a receiver may not be appointed on the application of one defendant, as to property in the hands of another, before hearing,² it may be questioned whether this is universally true. In ——— *vs. Moore* (15 En. Law & Eq. Rep. 130), a receiver was appointed as against a defendant mortgagee in possession, on the application of another mortgagee, also a defendant. It is true it was after decree.

Ground of title to a receiver.—The next clause of this subdivision is, that the party is *to establish an apparent right to property which is the subject of the action*.

It is said that the party is to make a case when plaintiff, which will entitle him to the relief he demands in his complaint.³ The right of a defendant when he applies must appear on his case equally clear.

The rule is sometimes stated in the strong language of counsel, in *Clark vs. Dew* (1 Russell & Mylne, 108), “that the court never interferes by appointing a receiver, unless it entertains a clear opinion that when the cause is brought to a hearing a decree

¹ *Bloodgood vs. Clark*, 4 Paige's Rep. 574.

² *Trumbull vs. Ogden & Gibbons*, cited Halstead's Digest, 178.

³ *Hamilton vs. The Accessory Transit Company*, 3 Abbott, 355; *Hotop vs. Durant*, 6 Abbott, 371, n.

must be made in the plaintiff's favor." I apprehend this is not the true principle.

Lord Lyndhurst, in that case, did not recognize it as so stated, but spoke of the application as one made to the discretion of the court; and he examined the facts to show that the party upon the title and right he presented ought not to have a receiver.

The principle upon which the court directs property in controversy to be placed in the hands of a receiver pending a litigation, is, that the party applying has shown at least a probable interest in the property, and that there is danger of its being lost without such protection.¹

Many qualifications of this rule, in its exact strictness, are to be found.

If a number of parties claim a right to the property, and yet a contest exists which of them possesses it, it is sufficient that one or other of them has the right; and if it is not shown that neither possesses it as against the party in possession, a receiver may be had. It is enough that one of those who apply may, on the case as it stands, have the right, although the establishment of his claim destroys that of each of the other applicants.

Again, it is not an answer to this application, that doubts exist as to the propriety of the frame of the suit, and that there may be a necessity of making further parties. If the court can see that an amendment will remove these difficulties, it will proceed.²

Again, upon the question of title, a very important distinction exists between cases where different and hostile equitable interests are involved, and where one party has the legal title unquestionably in him, and particularly where with such title he is in possession.

In instances of the last character the court interferes rarely and with reluctance. Yet cases may be made out to justify it.

¹ Harris, Justice, in *Goodyear vs. Betts*, 7 Howard's Pr. Rep. 187.

² *Fripp vs. The Chard Railway Company* (21 En. L. & Eq. Rep. 53); *Evans vs. Coventry* (31 *ibid.* 436). In the last case there was, among other objections to the frame of the bill, a misjoinder of plaintiffs, and a want of parties. But the court held that, although the bill must be thoroughly amended before a decree could be had, this formed no objection to granting a receiver. The plaintiffs were interested in the property which was in danger.

In *Lloyd vs. Passingham* (16 Vesey, 59), Lord Eldon stated the rule as strongly as this: that the court must not only be satisfied of the existence of fraud, but be morally sure that, upon the hearing of the cause, the party would be turned out of possession; and not only that, but it must see the same danger to the intermediate rents and profits.

Yet the appointment was made in *Hugonin vs. Basely* (13 Vesey, 104), "where there was a strong probable title in the plaintiff to call back the estate upon such terms as may seem proper at the hearing." In *Stilwell vs. Wilkins* (6 Madd. Rep. 49; Jacobs' Rep. 280) it was granted on a bill to set aside a sale of the plaintiff's ancestor, because of the inadequacy appearing monstrous, and the situation of the party and state of his intellect such that it was hardly possible to suppose the transaction could stand.

But the rule is less rigorous where the relation, or contract between the parties, raises the question, whether the applicant is not entitled to the legal estate.¹

The apparent right is to be shown to property which is the subject of the action. It may be stated that whatever property may be the subject of an action, and be recovered or applied in that action, may be subject to the power of a receiver. It may . . . be easier to say what is excluded.

In *Davis vs. The Duke of Marlborough* (1 Swanston, 74) it was held that the pension of the duke could not be charged or aliened by him, and a receiver was refused as to it. This was upon a particular act of Parliament. In general, a pension from the Crown may be reached in satisfaction of debts.²

The half-pay of an officer of the navy or army is, however, exempt in England.³ The salary of a counsel to the Commissioners of the Treasury, being a public officer, was held not assignable, and not subject to a receiver.⁴

¹ *Metcalf vs. Pulvertorf*, 1 Ves. & Bed. 180; *Shakel vs. The Duke of Marlborough*, 4 Madd. Rep. 463.

² *McCarthy vs. Gould*, 1 Ball & Beatty, 387.

³ *Ibid.* *Stone vs. Lidderdale*, 2 Anstr. 533; *Colyer vs. Fallon*, 1 Turner's Rep. 459.

⁴ *Cooper vs. Reilly*, 2 Simons' Rep. 560. At the hearing, a case was made for the opinion of the Judges of the Court of Common Pleas upon this question.

In *Blanchard vs. Cawthorne* (4 Simons, 566) a receiver was ordered of the rents, offices, benefits, and franchises of a Master of the Royal Forests. The court thought these profits might not be subject to an *elegit* at law, but could be treated in equity as assets liable to specialty creditors.

In *Browning vs. Betts* (8 Paige, 568) the Chancellor decided that the complaint in a judgment creditor's bill could not reach the compensation which the debtor would become entitled to as assistant marshal in making the census. But in other cases cited it was admitted that the compensation actually earned could be reached.

The author has decided in one case, as Assistant Vice-Chancellor, and submitted as counsel to a decision of Vice-Chancellor McCoun, that the salary of a custom-house officer past due, could be reached, but not the future earnings. A receiver could not be appointed to collect them. It may be doubted whether the accrued salary of any public officer can be protected from the claims of creditors.

The next clause of this first subdivision is, that the property is in the possession of an adverse party.

Generally speaking, a receiver supersedes the possession of one who claims the right and the possession, in hostility to the applicant. Yet it is not to be understood that there must be such an adverse possession before a receiver can be appointed. In the important case of *Davis vs. The Duke of Marlborough* (1 Swanton's Rep. 74) the plaintiff had an annuity charged on real estate, and *elegit* creditors were in possession. A receiver was appointed without prejudice to their rights.

In *Thompson vs. Van Vechten* the possession of a steamboat was in the Marshal of the United States, under a claim upon maritime liens, and a receiver was appointed to receive the surplus from the District Court, which was claimed by numerous adverse parties in a suit in the Superior Court. (5 Duer's Rep. 618.)

It may perhaps be accurate to say, that the clause means that the property is not in possession of one holding under, or recognizing the applicant's title. A first mortgagee in England who has the legal estate may not have a receiver, because he may enter. The mortgagor holds under him.

The next clause of the provision is, that the property, or its rents and profits, are in danger of being lost, or materially injured or impaired.

It seems to be obvious that this rule must be applied with strictness or relaxation, according to the position of the applicant and nature of the case.

A surviving partner has, for example, the legal title to the property. He may insist upon holding and converting it, until a strong case of danger, from insolvency or misconduct, is made against him. And he may insist on delivery to him, without making a strong case against those in possession. (*Shuler vs. Bleidorn*, Superior Court, Dec. 1853; *Evans vs. Evans*, 9 Paige, 178.)

Where, however, partners or joint owners are upon an equal footing in respect to the legal right, it is nearly a matter of course, upon a dissolution being made, or an action brought to effect a dissolution, to have a receiver. (*Wilson vs. Greenwood*, 1 Swanston, 478-480; *Smith vs. Danvers*, 5 Sandf. Supr. Ct. Rep. 609.)

A solvent partner, his associates being insolvent, has not the paramount legal title, like a survivor. Yet he should be appointed receiver, if no objection exists as to his capacity or integrity. (*Hubbard vs. Guild*, 1 Duer's Rep. 662.)

A plaintiff alleged, upon information and belief, that an assignee was not the owner of property or effects of any description sufficient to meet his debts and liabilities. This statement, if undenied, is sufficient to show that the property in the assignee's hands was in danger, and to justify the appointment of a receiver. (*Goodyear vs. Betts*, 7 Howard's Pr. Rep. 187; *Connah vs. Sedgwick*, 1 Barbour's Supr. Ct. Rep. 210.)

Where a joint ownership existed in a vessel and her freight, between the plaintiffs and defendants, which the court treated as a partnership, the court refused to restrain her sailing, or to compel a sale by a receiver, before judgment, but security was required to account for her earnings, and for her safe return within the jurisdiction of the court, to abide its judgment, or to pay the plaintiffs the amount of their present value.

The exception introduced in 1858 to the power of the court to

appoint a receiver is, "in cases where judgment upon failure to answer may be had without application to the court."

The cases in which this may be had are declared in section 246.

No doubt, however, a receiver may be appointed after such a judgment, as well as after any other, to carry it into effect, or dispose of property according to it, under subdivisions 2 and 3 of the present section.

In *Austin vs. Figuera* (7 Paige, 56) it was held that after a bill had been taken as confessed against a defendant for want of appearance, an application for the appointment of a receiver may be made *ex parte*, and without notice to him. (*Nesmith vs. Halsted*, 11 Paige, 647.)

In what cases appointed.—After the analysis of this leading clause of the section, the next subject of consideration is, the enumeration of the ordinary cases in which a receiver will be granted during the litigation.

Partnership Cases—"When a partnership expires, whether by the death of a party, or efflux of time, without special provision as to the disposition of the property, in all those cases, to which I may add the bankruptcy of a partner, the partnership is considered in one sense as determined, but in a sense also as continued, that is, continued until all the affairs are settled; and as in the ordinary course of trade if any of the parties seek to exclude the other from taking that part in the concern which he is entitled to take, the court will grant a receiver; so, in the course of winding up the affairs, after the determination of the partnership, the court, if necessary, interferes on the same principle." (Lord Eldon, in *Wilson vs. Greenwood*, 1 Swanston, 471, 480.)

The general rule, that the bill must show that the party will be entitled to a dissolution of the firm, or that a decree may be made according to an agreement for regulating the mode of carrying on the business, is even stronger in the case of a receiver than of an injunction. (*Goodman vs. Whitcomb*, 1 Jac. & Walker, 569; *Chapman vs. Beach*, *ibid.* 573, n.)

Lord Eldon said: "It may be a question whether the court will not restrain a partner, if he has acted improperly, from doing certain acts in future; but if what he has done does not give the other a right to a dissolution of the partnership, what right has

the court to appoint a receiver, and make itself the manager of every trade in the kingdom?"

In *Court vs. Harris* (Turner & Russell, 496) the appropriation of the profits of Covent Garden Theatre was provided for in articles of agreement. The owners of seven-eighths attempted to apply them otherwise, and, on a bill filed for specific performance of the covenants, a receiver was appointed.

It may be stated that, when a dissolution is intended, or has taken place, a court of equity will appoint a receiver, provided there be some breach of the duty of a partner, or of the contract of partnership.¹

If one partner unjustly takes possession of the property, and refuses to give security for the other's share of the stock, &c., a receiver may be had.

In *Roberts vs. Eberhardt* (23 En. L. & Eq. Rep. 245) two solicitors had carried on business in partnership, without any definite time fixed for its continuance. One of them gave notice of dissolution, and refused the other access to the books. A receiver was appointed, and an order as to access was made.

If, after dissolution, one partner attempts to carry on the trade with the partnership effects, on his own account, this affords ample ground for the appointment.²

In a suit between the representatives of a deceased partner and the survivor, the survivor has the legal right to wind up the concern, and this will not be interfered with except upon the ground of faithlessness or insolvency. (*Evans vs. Evans*, 9 Paige, 178; *Madgwick vs. Winble*, 6 Beavan, 495; *Dyer vs. Clark*, 5 Metcalf, 576; and the cases cited Collyer on Partnership, § 129, n.)

When a partnership is dissolved by reason of the insolvency of one of the members, and the other partner is solvent, the court will interfere by injunction and receiver, to collect the assets and make distribution. The rights of the insolvent partners were the same as if the partnership had been dissolved for any other cause. (*Hubbard vs. Guild*, 1 Duer's Rep. 662.)

In case of the death of all the partners, and a suit between the

¹ Collyer on Partnership, p. 196; *Harding vs. Glover*, 18 Vesey, 281.

² *Martin vs. Schaick*, 4 Paige's Rep. 479; *Harding vs. Glover*, *ut supra*.

representatives, a receiver is allowed as a matter of course. (*Philips vs. Atkinson*, 2 Bro. Ch. Ca. 272.)

I apprehend that a surviving partner is not entitled, without the assent of the representatives of the deceased partner, or some express stipulation in the articles of partnership, or otherwise, to use the firm-name in continuing the business. If the partnership-name or style has become the source of any value whatever, that value is common property. Either it perishes with the firm itself, and neither the survivor nor the representatives are entitled to use it; or it is an interest held in common, after the death of one partner as fully as before, precisely as all tangible property is held; that is, possessed legally by the survivor for the mutual benefit. The representatives have as much right to the name as the survivor.

On the dissolution and winding up of a partnership, where a valuable part of the firm's property consisted in the good-will of the business carried on (a newspaper establishment), such value, as much as the tangible property due to the firm, must be protected and disposed of for the benefit of creditors of the firm, or of the partner jointly.

The Judge said: "The valuable part of the partnership property consisted in the good-will, so to term it, of the paper; that is, the celebrity which it had acquired under the name of 'Porter's Spirit of the Times,' and the probability of that title continuing to attract custom."

The receiver was empowered to carry it on for a period, which was important to give time for disposing of the establishment advantageously. (*Dayton vs. Wilkes*, 17 Howard's Pr. Rep. 510.)

A receiver may be appointed of the assets of a limited partnership, when it has become insolvent, as well as any other.

In *Lachaise vs. Marks* (4 E. D. Smith, 612, n.), Justice Ingraham refused to appoint a receiver, and allow an injunction, in an action against an insolvent limited partnership, seeking to charge the special partner as a general one, where the complaint was by a single firm, and not on behalf of all who should come in, &c.

In *Whitwright vs. Simpson* (2 Barbour's Rep. 379) it was ruled that where a limited partnership had become insolvent, and neglected to place their assets in the hands of a proper trustee, to be distributed among the creditors ratably, any creditor of the

firm might file a bill to restrain an inequitable disposition of the property, and have a receiver.

In *Innes vs. Lansing* (7 Paige, 583) the bill was by one creditor of such a firm, on behalf of himself and all those who should come in and contribute. Another bill of a similar character had been filed and a receiver obtained in that action.

The Chancellor refused to stay proceedings in the present suit, as no decree had been obtained in the other, which the plaintiff there might dismiss if he chose.

He held that the statute (1 R. S. 764) constituted the effects of the firm a special fund for the benefit of all the creditors.

And in *Jackson vs. Sheldon* (9 Abbotts' Rep. 127) the doctrine of *Innes vs. Lansing* was fully carried out. Certain creditors of a limited partnership had obtained judgments and levied executions. The parties made a general assignment for creditors without preferences. At the suit of a creditor on behalf of himself, &c., an injunction was allowed against the executions, and a receiver appointed.

Executors.—If there is danger to the estate in the hands of executors, from fraud, or spoliation, or neglect, a receiver may be had.

In *Middleton vs. Dodswell* (13 Vesey, 266) a receiver was granted on an affidavit that the executor and trustee had let premises in his own name only, reserving rent to himself; that large sums had been received, and not laid out in the securities directed, and that the funds were in danger of being lost.

In *Richards vs. Perkins* (3 Young & Collyer, 299) the executor had neglected his duty in getting in the personal estate of the testator. He had left a considerable portion of the property outstanding on improper securities, and had not raised a sum applicable to the support of infant legatees, which he was directed to do.

In *Scott vs. Becker* (4 Price, 346) the executor was sought to be removed on the ground of insolvency, and he did not meet the allegations to that effect contained in the affidavits. A receiver was appointed.

The mere fact that a testator knew that his named executor was insolvent, will not prevent the appointment of a receiver.

Langley *vs.* Hawk (5 Mad. Rep. 46) is to this effect; and the little that is opposed can scarcely be said to be authoritative.

In Jenkins *vs.* Jenkins (1 Paige's Rep. 243) the Chancellor said that the appointment of a receiver rests in the discretion of the court in all cases where executors have become bankrupt, or wasted or misapplied the assets, or where any part had been lost through their misconduct or negligence. There being one solvent executor, the order was for him to elect to act with a receiver; if he refused, then one to be appointed absolutely.

In Howard *vs.* Papera (1 Mad. Ch. Rep. 142) it was held not to be a sufficient ground for the appointment of a receiver, that the executor was poor. No misapplication or abuse of trust was shown.

In Gladdon *vs.* Stoneman (cited 1 Mad. Ch. Rep. 143, n.) the testator had appointed the defendant his executor, and his wife executrix. She died in his lifetime. Before his death the defendant became bankrupt. On certain facts, Lord Eldon said: "Without saying that a person known by a testator to be a bankrupt, and yet appointed an executor, can be controlled by the appointment of a receiver—in this case it is clear that the testator did not advert to the circumstance of this person being a bankrupt. A receiver must be appointed."

Trustees.—Any party clothed with the character of a trustee may be interfered with, and a receiver appointed over him, upon the same grounds as will induce the court to act in the case of an executor. (Wilson *vs.* Wilson, 2 Keen, 249; Brodie *vs.* Barry, 3 Merivale, 695.)

Mortgages.—If the mortgage money is due, and the premises are not of sufficient value to pay the debt and costs, the complainants are considered in equity as immediately entitled to the whole estate pledged as security, and a receiver of the rents and profits will be appointed in anticipation of the decree. But no such equity arises where the debt is not due, and the mortgagee has not taken an express pledge of the rents and profits to keep down the interest.¹

If the defendant in possession will give proper security to pay any deficiency upon a sale, a receiver will not be appointed.²

¹ Bank of Ogdensburg *vs.* Arnold, 5 Paige, 38; Sea Ins. Co. *vs.* Stebbins, 8 Paige, 565.

² Ibid.

In the case of *Aberdeen vs. Chitty* (3 Y. & Cott. 379) there was an equitable mortgage by deposit of title deeds. Upon the plaintiff making out a case of considerable danger to his security unless he was protected, a receiver was granted before answer.

A second mortgagee may in general have a receiver where the first is not in possession; but if he is, a receiver cannot be had unless it is shown that he has been fully paid off.

In *Berney vs. Sewell* (1 Jac. & Walk. 627), Lord Eldon stated that he had decided, in *Quarrell vs. Beckford* (13 Vesey, 377, but afterwards before Lord Eldon), that if the mortgagee in possession swore that anything was due to him, he could not be interfered with. There must be an admission that he has been paid, or a tender of what he claims to be due.

A mortgagee who has the legal estate cannot have a receiver; an equitable mortgagee may, but not if the first is in possession. A second mortgagee is an equitable mortgagee; and in two cases a receiver was appointed at his instance, without prejudice to the first mortgagee taking possession. (*Bryan vs. Cormick*, 1 Cox's Cases, 423; *Dalmer vs. Dashwood*, 2 Cox, 378.)

But under the system prevalent in our State, as a mortgagee cannot bring ejectment, he may (as is before shown) get a receiver of the rents and profits, if his security is inadequate.

Chancellor Walworth, in the *Sea Insurance Co. vs. Stebbins* (8 Paige, 565), states the rule thus: The court must be satisfied, beyond all reasonable doubt, that the mortgaged premises upon a Master's sale will bring sufficient to satisfy the debt, with interest and costs, or a receiver will be granted.

And if there is a party personally liable for the deficiency, his insolvency must be made out, or, at least, danger of his not being sufficiently responsible.

If an equitable mortgage is created by deposit of title deeds, by two tenants in common, and one receives the whole of the rents, a receiver may be appointed, although the other is out of the jurisdiction. (*Holmes vs. Bell*, 2 Beavan, 298.)

If there is an agreement for a mortgage, and a bill filed to compel its execution, and interest is due on money advanced, a receiver will be appointed.¹

¹ *Shakel vs. The Duke of Marlborough*, 4 Madd. Rep. 463; *Free vs. Hind*, 2 Simons, 7.

A mortgagee has no title to the rents of the premises paid into court by a receiver appointed in a suit establishing the will of the mortgagor, even although he gave notice to the tenants to pay the rents to him. He ought to have moved to discharge the receiver. His notice to the tenants could not divest the possession of the receiver, which was in truth the possession of those who claimed under the will of the mortgagor.¹

Wherever there is an equitable charge on lands, and a proper case is made of insecurity or neglect, a receiver will be granted.

Thus, in *Tanfield vs. Irvine* (2 Russell, 149), an annuity was secured by a charge on real estate, and the grantor went abroad. There was a prior charge on the property. The grantor's agent continued in receipt of the rents. A receiver was allowed. And see *R. Owing's case* (1 Bland. 297).

In *Shotwell vs. Smith* (3d Edw. Ch. Rep. 538) the Vice-Chancellor said: Receivers were allowed in mortgage cases with great caution, and only when the security was clearly inadequate, or the rents had been pledged for the debt. The amount of the rental was the best test of adequacy or inadequacy.

Chattel Mortgages.—In *Patton vs. The Accessory Transit Co.* (4 Abbott, 237) an order appealed from to the General Term was, that E. P. C., upon filing an undertaking in a certain sum, with approved sureties, be appointed receiver, and as such take possession of the four steamships named; and that the parties having possession deliver them up. Mortgagees, whose mortgages had become forfeited, were in possession. The court held, that to appoint a receiver over them, except in case of necessity, to preserve the rights of other parties, would be to impair the obligation of a valid contract, and was beyond the power of the court.

In *Bayan vs. Fellows* (28 Barbour, 452) it was held that a receiver would not be appointed over a mortgagee of chattels in possession, who swore that there was a balance due to him. Nor would a receiver be appointed to sell the property and keep the proceeds until accounts were settled between the parties. The mortgagor had a claim against the mortgagee, which would be the subject of a set-off.

¹ *Thomas vs. Bridgstocke*, 4 Russell, 64.

Vendor and vendee.—In a suit for specific performance, while the title is in a course of investigation, the court will appoint a receiver.

In *Boehm vs. Wood* (2 Jac. & Walker, 236) the property consisted of buildings and offices, on which it would be necessary to effect insurances, and of ornamental grounds, which required considerable attention and expenditure. A receiver was appointed, reserving the question at whose expense it should be.

The same case was again before the court (1 Turner & Russell, 332), and as the purchaser was compelled to take the title, the receiver was considered as his receiver.

In *Metcalf vs. Pulvertoft* (1 Vesey & Bea. 180) there was a voluntary settlement on a wife; then a conveyance by the settlor to the plaintiffs. The wife was in possession. The purchasers filed a bill to restrain the defendants from setting up a legal estate to bar an action at law, for possession, an account of rents, and a receiver; which was granted.

Joint tenants, &c.—The court, as a general rule, will not interfere between joint tenants, or tenants in common, to appoint a receiver, because a suit for partition is open to them.

Thus the rule was stated in *Tyson vs. Fairclough* (2 S. & St. 142), and Sir John Leach expressed a doubt whether, even in the case of an actual exclusion, the court would interfere.

Lunatics.—Pending proceedings for the appointment of a committee, if protracted, or urgent necessity exists, a receiver of the property may be appointed. (In the matter of *Heli*, 3 Atk. 635; in the matter of *Kenton*, 5 Binney, 613.)

Mr. Edwards, in his work on Receivers (p. 426), adds to these cases that of In the matter of *T. W. Wallis*, before Chancellor Jones, in 1827, where the assistant register was appointed provisional receiver of the estate and effects of the supposed lunatic.

Infants.—Upon a bill filed in behalf of an infant, and the court being satisfied that the property is in danger, a receiver will be granted. (*Anon.*, 1 Atkyns, 489; *Ex parte Whitfield*, 2 Atk. 315.)

It has been held that the receiver of an infant's estate should not have his recognizance discharged until a year after the infant had attained his age.

In *Hicks vs. Hicks* (3 Atkyns, 274) a receiver had been ap-

pointed of an infant's estate, who had no guardian, with directions to lay out the surplus rents on government or other securities, which he had neglected. He was charged with interest on the surplus.

He had settled accounts with the infant two days after the latter came of age, giving him copies of the accounts passed before the Master, delivering up vouchers, and paid over the balance appearing, which was accepted. Lord Hardwicke treated this as of no weight whatever.

In the matter of Van Horne, an infant (7 Paige, 46), upon an application to discharge the guardian and have his bond given up, the Chancellor said it was not the practice of the court to order the guardian's bond to be surrendered immediately upon the infant's coming of age, although he had settled his account. The ward was entitled to a reasonable time to investigate the account, and surcharge and falsify the same. One year was usually allowed for that purpose.

SUBDIVISION 2. "After judgment, to carry the judgment into effect, &c.—The next clause of the 244th section authorizes the appointment of a receiver "after judgment, to carry the judgment into effect."

This clause may be considered in connection with the first clause of the 3d subdivision: "After judgment to dispose of the property according to the judgment."

It was a common course of practice before the Code, upon bills filed to set aside a conveyance or transfer of property, brought by a judgment-creditor with an execution returned unsatisfied, that the decree appointed a receiver, and directed a transfer or conveyance to him, and that he sell the property.

The leading case of *The Chautauque Bank vs. Risley* (19 N. Y. Rep. 369) is sufficient to establish this proposition. The bill was filed in September, 1838, against an assignor and assignee, to set aside an assignment. On the 1st of November, 1838, a decree was pronounced declaring it fraudulent, and directing the assignor to convey the estate to a receiver. He conveyed to the receiver on the 5th of January, 1839, who sold to one White, under whom the defendant was in possession as his tenant. The plaintiff claimed by virtue of a sheriff's deed, made May 30th, 1840, under

a judgment against the same debtor recovered by one Adams, before the bill was filed, but after the other judgment.

“The appropriate object of a bill in chancery, so far as relates to lands in which the debtor has a legal estate subject to the statutory lien of judgments against him, is fully obtained when a decree is pronounced clearing away the fraudulent obstruction to the remedy by execution. If the court, however, proceeds further, and directs, first, an assignment by the debtor to a receiver, and then a sale by the latter for the purpose of satisfying the debt, the purchaser will undoubtedly acquire a title (2 Selden, 236). The fraudulent conveyance being annulled, the receiver, under an assignment to him, takes the title, which he can convey to a purchaser. But that title rests upon the debtor's own conveyance, and has no relation to the judgment.

“No creditor, however, having a statutory lien by judgment, could be compelled to take the equitable remedy. He may stand upon his lien, and the means which the law has given him to enforce it. He may sell upon his execution, and the purchaser will have a right to impeach the conveyance.”

In *The Chautauque Bank vs. White* (2 Selden, 236) it was laid down as a well-settled rule of the Court of Chancery, that it had power upon a bill of a judgment-creditor to set aside a fraudulent conveyance, to direct a transfer of the lands to a receiver by the grantor and the grantee, pending the suit, and, after decree, to direct a sale of the property by him, and the proceeds to be applied in payment of the judgment.

In a case before the author at Special Term of the Superior Court, the action was for the settlement of partnership accounts. All the creditors had been paid. The accounts between the partners were adjusted and balances ascertained. There remained some property outstanding, chiefly debts due the firm. A receiver was appointed in the judgment, to get in the residue of the property and apply it according to the provisions of such judgment. This second subdivision and the first clause of the third subdivision warrant this.

Other cases may be imagined in which such an appointment would be the regular and fitting course to execute the judgment. For example, if an annuity was charged upon a particular fund, such as the rents and profits of land, a receiver might often be

necessary or convenient to carry out a judgment establishing the lien and directing payment.

The ancient English practice for enforcing a decree was a sequestration of the disobedient party's property till he complied. A receiver may often be resorted to under this clause for a similar purpose. See the cases cited in the note to *Franklin vs. Colquhon*, 3 Swanston, 389, *et seq.*

Section 289, however, provides for the not unfrequent case of a decree for delivery of possession of real or personal property. The sheriff can take and deliver it.

In *Hilliker vs. Hathorn & Taylor* (Special Term Superior Court, March, 1860—Hoffman, Justice), the plaintiff had been appointed receiver by the Supreme Court upon supplementary proceedings on behalf of a judgment-creditor. He brought his action in the Superior Court, under authority given by an order of the Supreme Court, to set aside as fraudulent an absolute assignment of leasehold property by the defendant Hathorn to the defendant Taylor. She set up in her answer that the assignment was to secure her the sum of about \$800, in which Hathorn was indebted to her.

It was found by the court on the trial that she had been fully paid her demand, by rents received or with which she was justly chargeable. In settling the judgment, the form of which was contested, it was declared that the assignment in question was, as regards the judgment and execution of the creditor, null and void as a transfer of all the right and title of the defendant Hathorn, and that, as a mortgage or security in the nature thereof, it was to be deemed and adjudged fully paid and discharged, so far as concerned such creditor; that the defendants in the action should assign to the plaintiff, as such receiver, all and each of their respective right, title, and interest in the leasehold property; should surrender possession of any portion thereof in their or either of their actual possession; that the tenants in possession do pay their rents to such receiver; that he collect a sufficient sum out of such rents and profits to pay the costs of the action and of his appointment, and the amount due upon the judgment and execution, with interests and costs in the action in which such judgment was obtained; and that, after satisfaction of the same, he surren-

der such premises, and all possession thereof, and reassign the same, and all his title therein acquired under and by virtue of the judgment (that in the Superior Court), or any proceedings had thereunder, to the said Mary Taylor.

The rental was enough in that case to keep down the ground-rent, taxes, and other outgoings, and to pay the debt in a year. There was a prior mortgage, whose rights were not and could not be affected.

In *Field vs. Salter* (Special Term, Superior Court, 15th Feb., 1859; General Term, 15th June, 1861), a receiver had been appointed upon proceedings taken by one judgment-creditor; but, before such appointment, though after the order of examination, another judgment-creditor had commenced an action against the debtor and his assignee, to set aside an alleged fraudulent transfer of property.

The judgment declared the lien and set aside the transfer; and appointed the receiver under the proceedings, receiver in the action, with a direction for an assignment to him, and that he dispose of the same and pay the judgment.

In *Myer vs. Mohr and wife*, June, 1861, the whole issue being referred to a referee, he gave a decision setting aside a fraudulent conveyance of a house and lot to the wife, and that a receiver should be appointed to receive a conveyance from the husband and wife, and to carry the judgment to be entered into effect by a sale of the property. A motion was made to the court, and a receiver appointed by it, and the judgment was then entered, with the receiver named in it, and the usual directions.

In this connection section 287 may be adverted to, that real property adjudged to be sold should be sold by the sheriff, or a referee appointed for that purpose. I have always supposed this section relates to cases in which the court is directly authorized by statute to order a sale of real estate, such as mortgage and partition cases. See *Hoffman's Practice*, vol. 1, p. 133; *ibid.* p. 185.

Again, even where a receiver has been appointed *pendente lite*, the judgment should direct his continuance or appoint a new one, if such services are still necessary to carry it out. Strictly, a decree in favor of a party supersedes a receiver, although the

practice has arisen for convenience of obtaining an order or notice for his discharge.¹

SUBDIVISION 3.—(A) “After judgment, to dispose of the property according to the judgment.”

See the observations and cases upon this clause under the previous subdivision, No. 2.

(B) “To preserve property pending an appeal.”

The second clause of the third subdivision of the section authorizes the appointment of a receiver to preserve property during the pendency of an appeal. And, by section 336, it is provided that, where the judgment appealed from is for the assignment or delivery of documents or personal property, the execution shall not be stayed, unless the things be brought into court, or placed in the custody of such officer or receiver as the court shall appoint, or the undertaking therein prescribed be entered into. I do not know of any case upon this point. I presume section 336 explains it.

(C) Execution unsatisfied, &c.

The last clause of this third subdivision is, “when an execution has been returned unsatisfied, and the judgment-debtor refuses to apply his property in satisfaction of the judgment.” The second clause of section 292 provides for proceedings in such a case; and, by section 298, the judge may also, by order, appoint a receiver of the property of the judgment-debtor, in the same manner and with the like authority as if the appointment was made by the court, according to section 244.

It would seem, therefore, competent for the court to appoint a receiver, after being satisfied of the refusal of the debtor to apply his property, which could be upon affidavits on a motion. But the course is, I believe, universally pursued under the 292d and 298th sections. I have not known of a case of such an appointment strictly by the court.

That subject is considered fully under the head of Receivers on supplementary proceedings.

SUBDIVISION 4. Cases of corporations.—The fourth subdivi-

¹ Daniel's Prac., vol. 2, p. 1582; Gibson *vs.* Lord Mountfort, Seton on Decrees, 330; Gilbert *vs.* Whitmarsh, cited 2 Daniell, 1629; 2 Maddock's Chy. Practice, 298, ed. 1837.

sion of the section provides, that a receiver may be appointed [1] “in the cases provided in this Code, and by special statutes, when a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights; [2] and in like cases of the property within this State of foreign corporations.” [3] Receivers of property within this State of foreign corporations shall be allowed the same commission as is allowed by law to the trustees of the estate of absconding, concealed and non-resident debtors.

1. Cases provided in the Code.—The writ of quo warranto, and proceedings by information in the nature of quo warranto, are abolished; and the remedies heretofore obtainable in those forms may be obtained by civil actions under the provisions of this statute. (Code, section 428.)

The 429th section directs that the Attorney-General may proceed against a corporation, when the Legislature shall so direct, for the purpose of vacating or annulling its act of incorporation, or any renewal thereof, when procured upon fraudulent suggestion, or concealment of a material fact by the persons incorporated, or by some of them, or with their knowledge and consent. Section 430 enacts, that an action may be brought by the Attorney-General in the name of The People, on leave granted by the Supreme Court, or a judge thereof, for vacating the charter, or annulling the existence of a corporation, *other than municipal*, in five specific cases, viz. :

1. When it shall offend against any of the provisions of the act, or acts, creating, altering, or renewing such corporation; or,

2. Shall violate the provisions of any law, by which such corporation shall have forfeited its charter by abuse of its powers.

3. Whenever it shall have forfeited its privileges or franchises, by failure to exercise its powers.

4. Whenever it shall have done, or omitted, any act which amounts to a surrender of its corporate rights, privileges, and franchises.

5. Whenever it shall exercise a franchise or privilege not conferred upon it by law.

By section 442, if it be found that a corporation has forfeited its corporate rights, privileges, and franchises, judgment shall be rendered, that the corporation be excluded from such corporate

rights, privileges, and franchises, and that the corporation be dissolved.

And by section 444, when such judgment shall be rendered against a corporation, the court shall have the same powers to restrain the corporation, to appoint a receiver of its property, and to take an account, and make distribution thereof among its creditors, as are given in Article three, Title four, Chapter eight, of the third part of the Revised Statutes. Those provisions relate to the voluntary dissolution of corporations. (See 2 R. S. 467.).

It is, then, only after judgment under these sections, that a receiver may be appointed.

2. Special statutes.—The next clause of this subdivision of the section is, where, by special statutes, a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights.

Under the head of “Injunctions” (*ante*, p. 263 *et seq.*) the provisions of our statutes are stated in regard to corporations when insolvent, or violating their charters, or otherwise infringing the law.

It may be stated that generally, when an injunction can be had, a receiver may be appointed.

The 41st section (2 R. S. 464) of the act as to “proceedings in equity against corporations” provides “that, upon such application being made” (for an injunction), “and in any stage of the proceedings thereupon, the court may appoint one or more receivers to take charge of the property and effects of such corporation, and to collect, sue for, and recover the debts and demands that may be due, and the property that may belong to such corporation; who shall, in all respects, be subject to the control of the court.”

Such receiver shall possess all the powers and authority conferred, and be subject to all the obligations and duties imposed, in article third of this title, upon receivers appointed in case of the voluntary dissolution of a corporation.

This third article (2 R. S. 468, 469) provides, in section 65, for the appointment of one or more receivers of the estate and effects of a corporation voluntarily seeking a dissolution. Section 66 directs who may be receivers, and the security to be given. Section 67 enacts, that such receivers shall be vested with all the estate, real and personal, of such corporation, from the time of

their having filed the security before required, and shall be trustees of such estate for the benefit of the creditors of such corporation, and of its stockholders. And, by section 68, such receivers shall have all the power and authority conferred by law upon trustees to whom an assignment of the estate of insolvent debtors may be made, pursuant to the provisions of the fifth chapter of the second part of the Revised Statutes.

These powers are found (2 R. S. p. 41) in sections 1 to 65.

The receiver of an insolvent corporation represents both creditors and stockholders, and may assert their rights when affected by a fraudulent or illegal act of the institution.

In *Gillet, Receiver, vs. Moody* (3 Comstock, 479) a receiver of a bank organized under the general banking law succeeded in an action to set aside an agreement and transfer of certain securities to one of its directors.

In *Talmage vs. Pell* (3 Selden, 328) a receiver of a banking association was permitted to repudiate an illegal purchase of State stocks, and to disaffirm an assignment of mortgages made thereupon.

The case of *The Attorney-General vs. The Life and Fire Insurance Co.* (4 Paige, 224) is a striking example of this principle. A petition was presented by the receivers appointed under the 41st section of the act of proceedings against corporations in equity, stating the advertisement for creditors and claimants—that certain claimants upon what was known as bonds issued by the company had presented their demands, which had been objected to by stockholders and certain admitted creditors; that such claimants and the receivers had agreed upon referees in the manner prescribed by the statute (2 R. S. 45, § 19). Certain proceedings had taken place before the referees; but the parties there contesting had agreed upon a plan of distribution. As there were many stockholders who had not consented to such arrangement, some of whom desired the question of the validity of the bonds to be brought before the court, the receivers prayed the direction of the court in the matter.

The Chancellor said that they should not allow any claim which could not have been recovered against the corporation either at law or in equity. They were directed to proceed before the referees to procure a final decision upon the validity of the claims.

This was done, and the decision of the referees was obtained, declaring the instruments were illegal and void, furnishing no evidence of a valid debt against the company. On exceptions, the Chancellor sustained the decision. See *Attorney-General vs. Life and Fire Ins. Co.*, 9 Paige, 470.

As to all legal transactions, however, which would be sustained as to the company, or its creditors, the receiver is fully bound. For such purposes he stands as the representative of the company. He is as much bound by a settlement which the company was authorized to make, as was the company itself. (*Hyde vs. Lynde*, 4 Comstock, 387.)

By an act of the 5th of April, 1849 (the act to enforce the responsibility of stockholders), stated particularly under the head of "Injunctions," when the judge has made an order declaring the corporation or association designated in the act to be insolvent, and shall restrain the company and its officers as directed, he shall immediately appoint a receiver of the property of such corporation or association. (Sect. 9, Session Laws, 1849, ch. 226.)

And, by section 10, one or more stockholders may apply to a judge of the Supreme Court for an order, declaring the company or association insolvent, or in imminent danger of insolvency.

The 11th section, as modified by the act of March 15, 1855, and other sections, prescribe the powers and duties of a receiver in such proceedings. It is not thought necessary to state them in detail. No counsel or receiver would act under them without carefully considering the language. It will be sufficient to advert to the authorities expounding the act.

In the *Empire City Bank* (18 N. Y. Rep. 199) it was held, among other things, that the proceeding of a receiver, under the act to ascertain the debts and liabilities, is *ex parte*, and his report is not conclusive upon the stockholders, or other parties; but the whole question is open to litigation before the referee, who is to make the apportionment of the unsatisfied debts, and ascertain the persons liable therefor.

In *The Reciprocity Bank* (22 N. Y. Rep. 9) the court put a construction upon some of the provisions of this statute. In the matter of *The Hollister Bank* (23 N. Y. Rep. 508), Justice Selden states that it was decided in substance in this case, that for a re-

ceiver to make a dividend among the creditors, and proceed against the stockholders, while he had in his hands assets which it is in his power to convert into cash within the most extended time allowed by the act for making the dividend, would be a violation of the spirit of the act, and in conflict with the general scope and tenor of its provisions.

In *The Matter of the Hollister Bank* (23 N. Y. Rep. 508), the bank had been organized under the general banking law. It was declared insolvent in 1857, and a receiver appointed.

Among other points ruled in the Court of Appeals, it was held that it was the duty of a receiver, under this act, to declare a dividend within one hundred days after his appointment, and for that purpose to collect and sell all the assets not in litigation, or to show, in respect to choses in action not in litigation, an order of a judge postponing the sale. Such order is not to operate to postpone a dividend out of the funds actually in hand.

The act was not intended to authorize proceedings to compel payment by the stockholders, until all the assets of the bank readily convertible into cash should have been converted and the avails distributed.

Although the general object was that the assets should be first applied, as the primary fund, yet the creditors were not to be delayed beyond six months in obtaining payment from the stockholders. If there is sufficient reason for postponing a sale of assets, the stockholders must contribute to the debts, and be reimbursed out of the assets when sold.

The receiver who has assets on hand, consisting of choses in action not in litigation, cannot make a dividend with propriety, until he has applied to a judge and taken his direction as to a sale. He has power to sell at auction every thing, except choses in action, without the authority of a judge.

By a law of March 19, 1852 (Sess. Laws, ch. 71), it was provided (section 1), that any receiver heretofore appointed by any court in this State, by virtue of Section 36, Ch. 8, Tit. 4, Art. 2, Part 3, of the Revised Statutes of this State (2 R. S. 457, of proceedings in equity against corporations), shall have and possess all the power and authority, and be subject to the same obligations and duties, as are provided in Article 3, Title 4, Chapter 8, Part 3, of the Revised Statutes of this State, in relation to re-

ceivers appointed in case of the voluntary dissolution of a corporation.

By section 2, in case the corporation is a mutual insurance company, the receiver shall have power, under the authority and sanction of the court appointing him, to make such assessments on the premium notes belonging to the corporation as may be necessary to pay the debts of the corporation, as the directors are authorized to make. Notice must be given in the manner provided in the charter; and the receiver shall have the like rights and remedies, upon and in consequence of the non-payment of such assessments, as are given to the corporation or directors by the charter.

The receiver is authorized, by section 3, to receive a voluntary surrender of all policies issued by the corporation, in all cases where, by the charter, the directors are authorized to receive the surrender of, or cancel, such policies.

And, by section 4, the court by which any such receiver may have been or shall be appointed is authorized, upon a proper action instituted for that purpose by the receiver, to examine, by a reference or otherwise, into the proceedings and acts of such corporation. If it shall appear that the officers or directors have misapplied, or improperly disposed of, the funds, property, or effects of such corporation, it shall be lawful for the court to decree that such guilty officers or directors pay the same to such receiver, and to enforce the decree by such process as may be necessary.

In *Bangs vs. Dunckinfield* (18 N. Y. Rep. 592) it was decided—

1. That this act was a public and general act, and not unconstitutional in its operation upon a corporation not before dissolved by a final judgment.

2. That an assessment made by a receiver of a mutual insurance company under an order of the court, made on his application, without notice, stands on the same footing as one made by the board of directors, and is not conclusive as a judicial determination upon the person assessed.

It was no objection to such an assessment, or to the notice thereof, that the persons called upon to contribute are apprised of the amount of their liability only by a statement of the rate per cent. at which the premium notes in force at a particular

date are respectively assessed. It is enough if the makers of the notes are furnished with the data for computing the amount.

But where the assessment and notice imposed two rates of assessment—a smaller rate on what were termed “large notes” and a larger on “small notes”—and no criterion for determining what the terms meant, or in which class the defendant’s note would fall, it was held inoperative for uncertainty.

This case related to the Genesee Mutual Insurance Company; and in *Bangs vs. Gray* (2 Kernan, 477) it was held, under the charter of that company, that a member was liable upon his deposit note for losses in the proportion which that note bore to the aggregate of deposit notes which were collectable, and legally subject to assessments for such losses. He was bound to pay an assessment made upon his note to meet a deficiency of funds to pay losses arising from the inability of other members to pay the proportion assessed upon their notes. The obligation to contribute among the members of such companies resembled that which prevailed among several sureties for a common principal. The rule in equity was to divide the whole loss among the solvent sureties.

In *Savage vs. Medbury* (19 N. Y. Rep. 32) the Empire State Mutual Insurance Co. had been organized under the act of 1849. The note in question had been given as a deposit or premium note. It was payable in such portions, and at such time or times, as the directors may, agreeably to their charter and by-laws, require. Upon the insolvency of the company, the plaintiff had been appointed receiver, on the application of a creditor, under sections 39, &c., of proceedings against corporations in equity. He sued upon the note without any precedent assessment. It was held that, under section 13 of chapter 406 of 1853 (the act under which the company was incorporated), an assessment was a necessary condition for the maintenance of an action. These premium notes were to be collectable only on assessments for losses, and expenses incurred, during the time of the existence of the corresponding agreements to insure. Though the company was insolvent, it did not follow that the defendant would be bound to pay the whole amount of his note. The receiver could not sustain an action except under the circumstances in which the company could have done so.

In the matter of John Berry, receiver of the Atlas Ins. Co. (26 Barbour, 55), it was held that the appointment of a receiver of an insolvent insurance company took effect from the time of granting an order for a reference to appoint a receiver. From that moment no act could be done affecting the property of the corporation, either by the corporation or its creditors.

But we must notice, that, by section 71, all sales, assignments, &c., "made after the filing of the petition for the dissolution, were absolutely void." The company could do nothing with its property after that period. In the interval, no one was competent to interfere with it. And when a receiver was appointed, the property could scarcely be said to have vested in him by relation back, but vested in him at his appointment, and had continued in the corporation at large, prohibited from being parted with, after the petition for a dissolution.

By an act of April 21, 1862 (Sess. Laws, ch. 412), provision is made for a reference and proceedings under it, in case of a disagreement between the receiver of an insolvent or dissolved mutual insurance company, in the settlement of any demand or claim against any member or stockholder, or any other person.

By an act of January 22d, 1842, it was declared, that receivers of moneyed institutions should be entitled to the same commissions for their services as are now allowed by law to executors and administrators; and no greater or other commissions or compensation shall be received or retained by them.

By an act of April 24, 1845 (Sess. Laws, ch. 87), any purchaser, from the receiver of a banking corporation, of any chose in action belonging to the assets of such corporation, may prosecute the same in his own name in all cases where by law the said suit could be prosecuted in the name of such receiver.

By an act of April 28, 1845 (Sess. Laws, ch. 112), any receiver appointed by virtue of an order or decree of the Court of Chancery may take and hold real estate, upon such trusts and for such purposes as the court may direct, subject to the further order or direction of the court, from time to time, in relation to the disposition of such real estate.

By section 2d of the same act, receivers, and committees of lunatics and habitual drunkards, appointed by any order or de-

cree of the Court of Chancery, may sue in their own names for any debt, claim, or demand transferred to them, or to the possession and control of which they are entitled as such receiver or committee; and when ordered or authorized to sell such demands, the purchaser thereof may sue and recover therefor, in his own name, but shall give such security for costs to the defendant as the court in which such suit is brought may direct.

By another act of March 15, 1855 (Sess. Laws, ch. 69), the eleventh section of the act of April 5, 1849 (the act to enforce the responsibility of stockholders, &c.), was amended so as to read: "Every receiver appointed according to this act, after giving security, shall take into his possession all the property, effects, books, papers, accounts, and demands against such corporation or association, including the securities, if any, which have been deposited with the superintendent, belonging to such corporation or association, excepting therefrom so much of the same as may be necessary to enable the superintendent of the banking department to pay and redeem the outstanding circulation of such corporation or association. He shall immediately give notice, by publication in such newspapers as the superintendent or any justice of the Supreme Court shall direct, requiring the creditors of such corporation or association to exhibit and establish their demands before him within thirty days from the time of his appointment."

"Such receiver shall possess all the powers of receivers of corporations under the 3d Article of Title 4 of Chapter 8, Part 3, of the Revised Statutes, in respect to the settlement of all demands exhibited to them, and in all other respects, except as herein otherwise provided; and all such powers now conferred by law on trustees of insolvent debtors as may be applicable; and shall be subject to all the duties and obligations by law imposed on receivers of corporations, except as herein modified."

Abatement of suits.—By an act of the 26th of April, 1832 (Sess. Laws, ch. 295), the dissolution of a corporation by a decree of the Court of Chancery, or by the expiration of its charter, or otherwise, shall not abate any suit or proceeding in favor of such corporation which shall have been pending at the time of such dissolution; but all such suits or proceedings may be continued by the receivers who shall have been appointed for such corporation by the Court of Chancery, or by the trustees on whom the estate

and effects of such corporation shall have devolved, in the name of such corporation, or in the names of such receivers or trustees who may be substituted as plaintiffs, under the direction of the court in which the suit shall be pending, and subject to such order as the court may deem expedient, in relation to the payment or security of costs.

By section 2, whenever a receiver of the property or effects of a corporation has been appointed before its dissolution, or afterwards, new suits may be brought and carried on by any such receivers, either in their own names, or in the names of the corporation for which they shall have been appointed; but no new suit shall be brought in the name of a corporation after it shall have been dissolved, or after the expiration of its charter.

By section 3, no suit commenced in the name of any such receiver shall be abated by his removal or death; but the same may be continued in the name of his successor, or of the corporation, if the charter has not expired or been dissolved, as may be directed by the court in which the suit shall be pending.

On the 17th day of April, 1858, an act was passed, entitled "An act to declare and extend the powers of executors, assignees, receivers, and other trustees, and to protect the rights of creditors and others against frauds, and for other purposes." (Session Laws 1858, ch. 314.)

"Section 1st. That any executor, administrator, receiver, assignee, or other trustee of an estate, or the property and effects of an insolvent estate, corporation, association, partnership, or individual, may, for the benefit of creditors or others interested in the estate or property so held in trust, disaffirm, treat as void, and resist all acts done, transfers and agreements made, in fraud of the right of any creditor, including themselves and others, interested in any estate or property held by, or of right belonging to, any such trustee or estate.

"§ 2d. That every person who shall, in fraud of the rights of creditors and others, have received, taken, or in any manner interfered with, the estate, property or effects of any deceased person, or insolvent corporation, association, partnership, or individual, shall be liable in the proper action to the executors, administrators, receivers, or other trustees of such estate or property, for the same, or the value of any property or effects so received or

taken, and for all damages caused by such acts to any such trust estate.

“§ 3d. That any indorser or other surety, and any assignee, executor, administrator, or other trustee, shall be entitled to and allowed to recover, from his principal, or cestui que trust, all necessary and reasonable costs and expenses paid or incurred by him in good faith, as surety or trustee in the prosecution or defence in good faith of any action by or against any assignee, executor, administrator, or other trustee, as such.”

By an act of the 14th of April, 1860 (Sess. Laws, ch. 403), it is enacted that the first section of the act of March 19, 1852, “An act to facilitate the collection of debts against corporations,” be amended so as to read as follows:

“Any receiver heretofore or who shall hereafter be appointed by any court in this State, by virtue of Section 36, Chapter 8, Title 4, Article 2, Part 3, of the Revised Statutes of this State, shall have and possess all the rights, power, and authority, and be subject to the same obligations and duties, as are provided in Article 3, Title 4, Chapter 8, Part 3, of the Revised Statutes of this State, in relation to receivers appointed in case of the voluntary dissolution of a corporation.”

Foreign corporations.—The clause of this subdivision marked 2, provides for the appointment of a receiver of the property of a foreign corporation. That marked 3, for the allowance to such receiver of commissions (*ante*, p. 485).

The proceedings by attachment against a foreign corporation to get a lien upon its property, is so generally the course, that I have not been able to find a case under the clause now considered, in point. (See title Attachment, *ante*.) There can be no doubt, however, that cases for the exercise of the power may arise.

Thus, for example, in *Tinkham vs. Borst* (31 Barbour's Rep. 407), it was held, reversing the decision below (15 Howard, 204), that a creditor, resident here, of an insolvent corporation located in New Jersey, had an equitable lien upon its assets, which enabled him to bring an action against a party who had fraudulently possessed himself of assets of the company. A receiver might no doubt have been appointed, in the progress of that action, if found necessary.

In *Thomas vs. The Merchants' Bank* (9 Paige, 216) it was held that a judgment against a foreign corporation, founded upon an attachment of its corporate property, was a proceeding *in rem.*, and not such a judgment upon which an ordinary creditor's bill could be founded. And after the property had become vested in a receiver appointed by the court of the State where the corporation is situated, the property could not be reached by an attachment here.

Receivers of a foreign corporation, appointed by the proper tribunal of the State in which it exists, may sue in the courts of our State to recover property.

Thus in *Runk vs. St. John* (29 Barbour, 585), such an action was sustained to set aside a conveyance of land of the corporation, as fraudulent, and for a conveyance by the defendant to the receiver. And see *Hoyt vs. Thompson* (1 Selden, 341).

SUBDIVISION 5. By subdivision 5 of section 244, a receiver may be appointed "in such other cases as are now provided by law, or may be in accordance with the existing practice, except as otherwise provided in this act. The period of the enactment of this subdivision is before stated (*ante*, p. 466).

The case before noticed, of an appointment of a receiver during a protracted contest, as to a committee of a lunatic, and by petition, would be covered by this provision.

Some other cases may exist where the first subdivision would not be sufficient.

Mode of appointment.—In the section as passed in 1849, it was provided that "the court may appoint receivers according to the present practice, except as otherwise provided in this act."

Under this, it was held that the practice of the Supreme Court in equity, which was governed by that of the former Court of Chancery, was the practice referred to, and was to control. (*Kemp vs. Harding*, 4 Howard, 178.)

The subsequent amendments of the Code have not defined any course of practice for the mode of appointment; and the 469th section—the healing section, as it may well be termed—will apply, except when inconsistent with the provisions of the Code.

The course of proceeding in the Court of Chancery varied. Sometimes an order of appointment was made by the court at

once—the person being agreed upon, and security settled or waived. In general, however, a reference was directed. Sometimes the order was to approve of a receiver, and report to the court the name, security, &c.; and the appointment was to be made by the court. And frequently the order was for the master to appoint a receiver. In the latter case, no act or order of the court was necessary to make the appointment valid. It could be reviewed, indeed, but only upon a distinct special application.

The subject was fully examined in the case of the Attorney-General *vs.* Day (2 Mad. Rep. 253). The course of proceeding was stated to be for the master to make a report approving of a person as receiver, and of his sureties, and certifying that when the recognizance is duly acknowledged, he will appoint such person receiver. Upon that being done, he appoints the person, and makes a report of such appointment. (See also Turner's Practice, 249; Seaton on Decrees, 316–320; 2 Fowler's Exch. Pr. 381; *Fairfield vs. Irvine*, 2 Russell, 152; *In re*, Eagle Iron Works, 8 Paige, 385.) By our practice in Chancery, the approval of the person, of the security and bond, and appointment, were all stated in one report.

In *Whetter vs. Schliper* (7 Abbott, 92; 6 *ibid.* 123) it was held that an order for a referee to appoint a receiver, and such appointment, was regular in a partnership case. It was in accordance with the Chancery practice which, for this purpose, continued in force.¹

In a case at Special Term, before the author as a Judge of the Superior Court (November, 1858), a case was made of a partner continuing to employ the funds of the firm in business after the dissolution. The partner was appointed receiver on condition that he gave and perfected the security directed, by a certain time, with other directions as to his keeping an account, &c.

In *Steele vs. Sturges* (5 Abbott, 442), in a partnership case, the order was by the court, that J. C. be appointed receiver of all the property of the firm; but before entering on the discharge of his duties, he execute a bond with two sureties, &c. After the order, and before the security was given, the sheriff levied on the property. The title of the receiver was held to be superior.

¹ Special Term Common Pleas—Hilton, Justice.

In *Wood vs. Lambert* (Nov. 1854, Special Term Superior Court—Hoffman, Justice) it was held, that an appointment by a referee in proceedings under section 298, was void. The judge was to appoint a receiver. The whole authority was conferred upon a judge, and not upon the court. He could not delegate it. He could, under section 300, order a reference to report evidence or facts, but that was all. Who was a proper person to be appointed, and the proper security, were facts as to which a reference could be ordered.

One consideration upon this subject has always seemed to the author of importance. The cases in which references may be ordered are expressly defined by the Code. The conclusion has seemed irresistible, that a reference cannot be ordered except in such cases.

Under section 271, subd. 3, a reference may be ordered when a question of fact other than upon the pleadings, shall arise, upon motion or otherwise, in any stage of the action. Other cases are provided for in sections 246, 269, and 287. No warrant for an appointment by a referee is to be found in either of these cases.

Section 469 expressly declares that the present rules and practice, inconsistent with the Code, are abrogated; but where consistent, they shall continue in force. The practice in question has seemed to me at least more inconsistent than consistent with these provisions as to references.

It deserves notice, that the clause of section 144, in the Code of 1849, was, that the court may appoint receivers according to the present practice; and the language of section 278 is, that the judge may appoint in the same manner as if the appointment was made by the court, according to section 244. The language now is: "A receiver may be appointed." But the heading of the section is: "Powers of the court as to receivers," &c.

The author's practice, as Judge in the Superior Court of New York, was nearly uniform: after deciding that a receiver was to be allowed, the parties were directed to appear, upon the settlement of the order, to name a suitable person and the proposed security. This question was settled at once in the great majority of the multitude of cases before the author. The receiver would be named, his security fixed, the bond executed, and one order recite, that it having been decided that a receiver ought to

be appointed of the property in question, and A. B. having been approved of as such receiver, and having executed a bond or undertaking approved of by the court (or judge), as appeared by his endorsement of approval on such bond now filed, thereupon it was ordered that A. B. be, and he thereby was, appointed receiver of, &c.

Two or three days usually sufficed for getting through the whole of this matter.

That a reference to inquire and report who is a proper person to be appointed, and the security to be given, is proper, is quite clear. In a case before the author (Superior Court, Sept. 1858), the order was, that it be referred to — as referee, to approve of a proper person to be the receiver of the assets of the firm, and of the security to be given; and that upon the filing of his report, with the undertaking or bond duly approved by him, and such report becoming confirmed, the said person so approved be deemed and appointed such receiver.

A notice of motion, a petition, or an order to show cause, may be resorted to in order to obtain the decision of the court for a receiver. Affidavits may be used to support the application; but if the case is presented upon a pleading, it cannot be changed or enlarged by affidavits.¹

By the rule in England, if one defendant has answered, and another material defendant has not, the answer may be used as an affidavit, and a counter affidavit may be used by the plaintiff. (*Kershaw vs. Mathews*, 1 Russell's Ch. Rep. 301.) In *Goodman vs. Whitcomber* (1 Jac. & Walker, 501) the answer was not filed on the day for which notice of motion was given, but was filed before it was brought on. The plaintiff was allowed to use a supporting affidavit.

Who may be a receiver.—A receiver must, of course, be an impartial person, having no interest hostile to that of any of the parties concerned, and not liable to any suspicion of being controlled by either party. He should have sufficient ability and knowledge to manage properly the particular business entrusted to him.

Lupton vs. Stephenson (11 Irish Eq. Rep. 484) was the case of a suit by a mortgagee for a sale, and a receiver had been ap-

¹ *Hayes vs. Heyer, &c.*, 4 Sandf. Supr. Ct. Rep. 485; *Austin vs. Chapman*, 11 Legal Observer, 113.

pointed by the master, and approved of by the Master of the Rolls. An appeal was taken to the Lord Chancellor. The principal part of the property was a mill and machinery, the cost of which had been £60,000. It was unlet. The master had appointed the nominee of the plaintiff, a person who did not understand the care of machinery, but who had given a written undertaking to follow the directions of another who did. The mortgagors had named another who was entirely competent, but was connected with them under certain trusts. On appeal, the report was sent back for the master to select a person competent to undertake the management of the machinery on his own responsibility.

In the same case, the Lord Chancellor expressed a strong disapprobation of appointing the defendant's nominee, which was nearly the same as appointing the defendant himself.

He is appointed on behalf of all the parties who may, in the course of the cause, appear entitled to the property or funds over which he is placed. He is not the agent or officer of the plaintiff or defendant.¹ The property is said to be in charge of the court, through its officer.²

He is appointed without regard to the person who may nominate him, although it is usual, when those proposed are equally unobjectionable, to prefer the one named by the party applying. (*Lespinasse vs. Bell*, 2 Jac. & Walk. 436; *Edwards on Receivers*, 2d Ed., p. 87.)

A party to the action is frequently appointed to the office, upon giving security, and acting without compensation.

In *Blakeney vs. Defaur* (15 Beavan, 40) the order was for a reference to the master to appoint a receiver of partnership property, with liberty to each party to propose himself as such receiver, without salary. On appeal, the order was varied by appointing the defendant receiver, without salary, on giving the usual security.

In *Hubbard vs. Guild* (1 Duer's Super. Ct. Rep. 662) the court considered that where one partner was insolvent, the other a defendant, being solvent, and of unquestioned capacity and integrity, ought to be appointed receiver.

¹ *Davis vs. The Duke of Marlborough*, 2 Swanston, 125; *Delany vs. Mansfield*, 1 Hogan, 234; *Iddings vs. Brewer*, 4 Sandford's Ch. Rep. 417.

² *Ibid.*

In *Deake vs. McCarthy* (9 Abbotts' Rep. 167, n.), Chief Justice Bosworth said, that if the allegations against the plaintiff, as to a misappropriation, had been fully answered, he would have done in the case as was done in *Blakeney vs. Dufaur*, or appoint the plaintiff receiver, without salary, on giving proper security. It was for the interest of the parties to have the affairs of the firm closed by a party who was familiar with them. As it was, he ordered a reference to appoint a receiver, with liberty to the plaintiff to propose himself to act, without a salary. The referee was also to report in respect to the business of the firm, which the receiver should be permitted to prosecute or finish.

In *Meaden vs. Sealey* (6 Hare, 620) liberty was given by the order for either party to propose himself as receiver.

Security.—The Code has not prescribed that security must be given, nor its extent or form. The former practice will be the rule, although it is presumed that the sixth rule of the Supreme Court will apply to bonds or undertakings given upon this appointment.

It sometimes happens, as where the parties concur in naming a receiver, the court will appoint him without security, upon his own bond only.¹

The security is, in general, to be in a recognizance, in the case of rents and profits, double the gross annual amount of rental or value; and in case of personal estate, double its value. The limitation in the case of rents and profits seems regulated by the fact that the receiver is bound, and the recognizance recites the obligation, to account annually, or as often as the court shall direct.²

Two sureties, together with the receiver, are required by the ordinary practice of the court;³ and, as before observed, I apprehend the 71st rule would regulate the question of sufficiency.

If the amount is large, and the receiver is unable to find two sureties who can qualify, the court, on special application, may direct three or four persons to be admitted as sureties for the full

¹ *Ridout vs. Earl of Plymouth*, Dickens, 68; *Hilbert vs. Hilbert*, 3 Merrivale, 681; *Abbott vs. Crawford*, cited *Smith on Receivers*, p. 15, upon a written consent.

² *Smith on Receivers*, 14; 2 *Fowler's Ex. Pr.* 380.

³ *Meath vs. Lord Orrery*, 3 Atk. 237; 2 *Fowler*, 380.

amount, requiring them to qualify respectively for a proportionate share.¹

The bond or undertaking should be to the people.² It should be executed and acknowledged according to the 71st rule, and should be approved in writing by the officer, and filed with the clerk.

Where an order was made by the court, that A. B. be appointed receiver of a partnership upon his filing a bond, with sureties, to be approved by the parties or a master, and the bond was executed and duly approved, but through inadvertence was not filed, an order was made directing it to be filed *nunc pro tunc*, and such order was affirmed on appeal.³

The whole effect of the order as to the sureties was left undetermined.

In *Manners vs. Fuze* (11 Beavan, 31) the Master of the Rolls would not dispense with security where the application was in the regular course for an appointment by the court, though the parties were content to dispense with it. But he said that the parties might appoint a receiver themselves, and then if they asked that he might act without giving security, it might possibly be done. He said also that this was precisely the course followed in *Ridout vs. The Earl of Plymouth* (Dickens, 68), as appeared by the Registrar's book.

In *Tybee vs. Tybee* (17 Beavan, 583) a married woman and infants were, it seems, concerned in the property which was in question; and the court refused to dispense with security, though the parties to the record consented.

Proceedings on a reference.—A reference relating to the appointment of a receiver, of mere approval at any rate, is allowed under the third subdivision of section 271. The Code then (sections 272, 314, 421) and the rules (rule 32) regulate the proceedings, as far as they contain any directions; and the old practice in chancery prevails, where they are silent. (See the notes to Voorhees' ed. of the Code, 1860, p. 366, &c.; Edwards on Receivers, 2d ed., p. 82, &c.; Tillinghast & Shearman's Prac., p. 750, &c.)

¹ *Bank of Ireland vs. Magrath*, Smith on Receivers, 15; Bennet's Practice in the Master's Office, p. 95, u.

² See the form, Hoffman's Master in Chancery, p. 376.

³ *Whiteside vs. Pendegrast*, 2 Barb. Ch. Rep. 412. See *Anon.*, 3 Atk. 520; *Donne vs. Lewis*, 11 Vesey, 601; *Jesson vs. Brewer*, Dickens, 370, as to the general rule upon entering orders *nunc pro tunc*.

It is stated in these books of practice, that the report of appointment is not confirmed in the usual mode, but may be revised by a petition.¹ Such undoubtedly was the chancery practice.²

But it would seem that the 32d rule of the Supreme Court applies to this case. In references other than for the trial of the issues in an action, the report is to be filed, and a note of the day of filing made by the clerk in a proper book, under the title of the cause or proceeding, and the report becomes absolute, unless exceptions are filed and served within eight days after service of notice of the filing.

In *Somers vs. Milliken* (10th Nov., 1858, reprinted Voorhees' Code, 1859, p. 616), the following exposition of the rule was made:

1. All such reports (other than those upon trial of the whole issues) must be filed, and a note of the filing made by the clerk.

2. That in all cases where any of the defendants appear, so as to be entitled to notice, such report cannot be confirmed until eight days after service of notice of filing the same.

3. That all the parties who have appeared in the cause or proceeding may consent, in writing, to waive the delay of eight days, and have the same confirmed at once.

4. That in cases where no one appears for the defendant, the report may be presented to the court for the final order of confirmation and judgment, without waiting eight days.

The rule in question was drafted by the author of the present work; and he supposed that there was thus provided one uniform course of dealing with all reports, except those upon a trial of the whole issues.

Rights, Powers, and Restrictions.

1. **When property vests.**—This point is fully considered under section 298, as to receivers on supplementary proceedings, and particularly the effect of the addition to section 298, made in April, 1862. The weight of authority is, as to cases within this 244th section, strongly against the rule stated in *Rutter vs. Tallis* (5 Sandf. Supr. Ct. Rep. 612), as to the relation back of an appointment to the date of the order. The cases of *The North Am. Gutta Percha Co.* (9 Abbott, 79); of *Rich vs. Loutrel* (ibid. 356);

¹ Edwards on Receivers, 2d ed., p. 95, &c.; Tillinghast & Shearman's Pr., p. 754.

² Matter of Eagle Works, 8 Paige, 386.

Voorhees vs. Seymour (26 Barbour, 569); and *The Artizans' Bank vs. Tredwell* (34 Barbour, 559), seem to settle the point in the Supreme Court.

But the amendment is only as to appointments under the 298th section, on supplementary proceedings. As to other receivers, it seems to me the rule now is, that he becomes effectually vested, as to personal estate, from the time the appointment is perfected. As to real estate, I apprehend a conveyance is still necessary.

2. Actions by.—A receiver ought not to institute an action without the permission of the court which has appointed him.

In *Merritt vs. Lyon* (5 Paige, 125, and 16 Wendell, 410) the point decided was, that the court had jurisdiction to restrain a receiver from prosecuting a vexatious suit in the name of a third person, without his consent, although the persons applying for the restraint were not parties to the suit in which such receiver was appointed.

In *Phelps vs. Cole* (3 Code Reporter, 157) it was decided that a receiver who prosecutes or defends an action, without leave of the court first obtained, was liable for costs personally if he failed.

In *Smith vs. Woodruff* (6 Abbott, 65) the rule was recognized. A receiver had brought an action without leave having been obtained. Judgment was entered against him for costs, and execution issued. A motion to set it aside was denied. He had prosecuted the action at his own peril, and should be left to the consequences.

The usual order in England is, that in case there shall be any occasion to put any of the debts in suit for the recovery thereof, the same shall be done with the approbation of the master; and such person to be appointed is to make use of the name or names of the parties for that purpose, who are to be indemnified out of the estate.¹

And in Ireland, an application is made for a reference to ascertain whether any particular things in action should be put in suit; and if the action must be brought in the name of an executor, &c., the master is to ascertain what indemnity should be given to the person in whose name the suit would be instituted. (*Smith on Receivers*, 165, 166.)

¹ *Seaton on Decrees*, 323, citing *Harden vs. Glover*. See, also, p. 325.

This course is rendered unnecessary with us by the act of April 24, 1845, by which receivers may sue in their own names. "Receivers and committees of lunatics and habitual drunkards, appointed by any order or decree of the Court of Chancery, may sue in their own names for any debt, claim, or demand transferred to them, or to the possession and control of which they are entitled as such receiver or committee." (Sess. Laws, 90.)

Receivers, appointed under section 298, of a fraudulent debtor's property, are, by rule 92, empowered to sue for debts, and in the name of the debtor, where necessary or proper.

A question has occurred to me, whether the act of April 24, 1845, was in force. It should be noticed that it applies only to suits in relation to personal property. The 111th section of the Code created the doubt, but by reference to section 113 it will be seen that one exception to the rule of section 111 is, where a person is expressly authorized by statute to sue.

But, as to ejectment, the question is not governed by the act of 1845; and it seems that the former rule must prevail. (See the statute as to the action of ejectment, 2 R. S. 303, § 3.)

In *Green vs. Winter* (1 John. Ch. Rep. 60) a trustee was restrained by injunction from interfering with the trust estate, and a receiver had been appointed. It became necessary to institute actions of ejectment to recover possession of land. An order was made authorizing the receiver to institute an action of ejectment in the trustee's name, the receiver giving an indemnity to the trustee for costs and damages.* (See, also, *In the matter of Merritt*, 5 Paige, 125.)

A party whose name is used in an action without his consent, has an undoubted right to indemnity. The receiver, having the sanction of the court, has an equally clear right that the fund in his hands should bear all charges necessarily incurred. (See *Merritt vs. Lyon*, 16 Wendell, 405, 411, and the cases there cited.)

In *Dacie vs. John* (McClelland's Exch. Rep. 575) the court refused to empower a receiver to sue for a debt, where the suit would be oppressive to creditors, or it was unlikely that any fruits would be derived from it.

The right to bring an action in his own name, to set aside a fraudulent transfer of property, is unquestionably vested in a receiver. (See *Porter vs. Williams*, 5 Selden, 142, and the act of April, 1858, before referred to.)

3. Actions against.—A receiver should not be sued by a third party, without leave of the court first obtained. If he is sued an order to enjoin the proceedings may be obtained.

In *Merritt vs. Lyon* (5 Paige, 125) Chancellor Walworth said: "The court will also, in its discretion, restrain third persons from instituting proceedings at law against its officers, although the persons instituting such suits are not parties to the suit in this court."¹

In *De Groot vs. Jay, Receiver* (9 Abbott, 364) the defendant was the receiver of an insolvent corporation; the plaintiff brought an action to enjoin him from enforcing two judgments, and to have them set aside. He had not obtained liberty to sue. The defendant applied by a petition for a stay. This was denied; but on appeal the order was reversed, and a stay of proceedings granted. It was declared, that in most cases claims against a receiver, or the fund, could be adjusted, upon a special motion, at a small amount of costs.

In *Hubbard vs. Guild* (2 Duer's Rep. 685) certain persons, petitioners in the action, had obtained judgment against a firm, composed of the plaintiffs, and Guild, one of the defendants, on the 21st of April, 1852. They issued an execution, had it returned unsatisfied, instituted a creditor's suit on the 2d of July, 1852, and had a receiver appointed on the 21st of September, 1852. The plaintiffs in the present action were the two partners and their assignees, under proceedings in Massachusetts, taken against the firm as insolvents, the effect of which was, as stated, to vest the whole property in such assignees. This action was commenced on the 22d of May, 1852, and on the 4th of November, 1852, a receiver was appointed, who took possession.

The application by the judgment creditors was for the declaration of their lien, and payment by the last receiver out of the funds in his hands. It was held that this could not be done; that the proper course for them was to bring an action with leave of the court against the receiver, with others, as advised, and thus settling the right to a priority. Such liberty was given; and an order made restraining the receiver from paying out the funds without notice to the attorney of the applicants. But had a de-

¹ See also *Warral vs. Lloyd*, 2 Molloy's Rep. 388.

cree been made in the suit, under which all creditors could have come in, and to which every creditor is *quasi* a party, the course by a petition would be proper. *Elliott vs. The United Insurance Co.* (7 Gills' Maryland Rep. 387), was an authority, and a valuable one, on this subject.

The omission to obtain leave to sue a receiver does not affect the validity of the proceedings, nor even make a judgment irregular. The party should have been restrained, or, under certain circumstances, could have been proceeded against as for a contempt. (*Chautauque Bank vs. Risley*, 19 N. Y. Rep. 376. And see a similar rule stated as to the committee of a lunatic. (*Crippen vs. Culver*, 18 Barbour, 424.)

A receiver should apply to the court for leave to defend an action. He may otherwise be personally liable for the costs, if he fail.

This was ruled in *Swaly vs. Dickson* (5 Simons, 639). The receiver defended an action which the court said would have been enjoined had he made an application for that purpose. He had no right to do any acts which might involve the estate in expense without first applying to the court. He was refused his costs and expenses attending the suit.

4. Interfering with possession of.—“It is well-settled, that after a receiver has been appointed, and has taken the rightful possession of the property, it is a contempt of the court for a third person to attempt to deprive him of that possession by force, or even by a suit or other proceeding against him, without the permission of the court by which the receiver was appointed. (*Angell vs. Smith*, 9 Ves. Rep. 335.) Where the receiver is in possession of property upon which a third person has a claim for rent, the proper course for the landlord is to apply to the court, upon notice to the receiver, for an order that the receiver pay the rent, or that the landlord be at liberty to proceed by distress or otherwise, as he may be advised. And if the claim is contested, the court will permit the claimant to go before the Master and be examined *pro interesse suo*. The same principles are applicable to every other interference with the possession of a receiver, sequestrator, &c., who holds the property as the officer of this court; as his possession is in law the possession of the court itself.” (Chancellor Walworth in *Noe vs. Gibson*, 7 Paige, 513.)

These remarks were made in a case in which a vessel, being in the hands of a receiver, a landlord distrained upon her for arrears of rent. The Chancellor said that the landlord ought to have applied to the court for an order that the receiver pay the rent out of the proceeds of the vessel, as was done in *Dixon vs. Smith* (1 Swanston, 457); and if the claim for the arrears was disputed, the court would give him leave to go before the Master and be examined.

The party was ordered to restore the vessel, or an attachment was to issue.

The course of the court as to an examination *pro interesse suo*, is stated in Hoffman's Chancery Practice, vol. i., pp. 155-6. But I apprehend that since the Code the proper mode of proceeding is by a petition entitled in the cause, and a reference under section 271, subd. 3, where an investigation in that manner is necessary or convenient.

5. Employment of attorney, &c.—The rule is, that a receiver may not employ the attorney or solicitor of either of the parties to the action in which he is appointed. This rule is for the protection of the rights of such parties. If they have no objection, he may employ the attorney of either to aid him in the discharge of his trust. (Per Chancellor in *Warren vs. Sprague*, 4 Edw. Ch. Rep. 417, n.)

6. Repairs and Improvements.—The general rule is undoubted that a receiver cannot, without the sanction of the court, expend money in his hands in repairing, much less in improving, the premises of which he has the charge.

Elliott vs. Clitheroe (6 Vesey, Jr., 801) is a leading authority. The receiver had expended money in mason and plasterers' work, and carpenters' work, all sworn to by him to be necessary and reasonable to make the buildings tenantable. The Master of the Rolls would not allow the amount on such a representation, but referred it to the Master to inquire into the circumstances of the expenditure, and whether the same was for the lasting benefit of the parties entitled to the estates. Upon the report a strong case was made, and the fact of the approbation of former trustees proven. The amount was allowed.

In *Tempest vs. Ord* (2 Merivale, 56) the Lord Chancellor said that formerly the court never permitted a receiver to lay out money without a previous order. But now, where he had

done so, it was usual to refer it to the Master to see if the transaction was beneficial to the parties; and if found to be so, the receiver was allowed the money. An order was made to inquire whether the buildings then being erected were fit and necessary, and for the benefit of the several persons interested.

7. Letting property.—The usual order upon the appointment of a receiver of real estate, contains a clause that the receiver may let and sell the premises.¹ This authorizes only a letting from year to year.² And such was the provision in the Chancellor's rule of 1838. Rule 192.

If it is desirable to grant a lease for a longer term, a special order must be obtained, on notice to the parties in the action.

In ——— *vs. Lindsay* (15 Vesey, jr., 91), there was an order of reference to determine what should be the term beyond which a receiver should not be allowed to lease an East India estate.

In *Lorillard vs. Lorillard* (4 Abbotts' Rep. 210) an order of the court had been obtained authorizing a lease by a receiver for twenty years, unless certain annuitants should sooner die.

In *Hobhouse vs. Hamilton* (2 Sech. & Lefroy, 28) a tenant for life, with a leasing power of lands devised, charged with payment of debts, had made leases of the premises. A judgment creditor got a decree which was in course of prosecution, and a receiver was directed to let the lands for three years, without prejudice to the claims under the leases, after the trusts of the will were satisfied.

Where premises consisted of a grist-mill not worth more than £15 a year, and the receiver's affidavit stated that no solvent tenant could be got for a term of three years, owing to the expense of fines, &c., and the want of repairs, the defendant consenting, the Master was directed to let the premises for the term of the natural life of the defendant, if it was found that he had power to let for such a term, the defendant to join in the lease. (*Saunders vs. Richards*, cited *Smith on Receivers*, p. 53.)

8. Tenants and distraining.—The order in England, and in the State of New York, usually directs that the tenants pay rents and attorn to the receiver of real estate.³

¹ Seton on Decrees, p. 319; *Smith's Receivers*, p. 50, &c.

² *Morris vs. Elme*, 1 Vesey, jr., 139.

³ 1 *Turner's Practice*, 256; 2 *Daniel's Pr.* 1615; *Morris vs. Mowatt*, in Ch'y, N. Y. 1831; 1 *Hoffman's Ch. Prac.* 444.

A written attornment should be obtained from the tenants by the receiver. In such a case they may be distrained upon, where the law of distress continues to prevail. And such distress may then be made without a special order. (*Pitt vs. Snowden*, 3 Atkyns, 750.)

In *Bennet vs. Robins* (5 Carr & Payne, 379), Tindal, Chief Justice, said: "A receiver, appointed by a court of law, must be considered in point of law as having a right of distress; otherwise the right to receive would be a mockery, for where the court was not sitting and no order could be made, a tenant might remove his goods, and the rent could not be recovered."

The distress is to be made by the party having the legal title. An attornment gives this to the receiver as against the tenants. If there is a doubt who has the title, it is proper to apply to the court for liberty to distrain and use the name of the party.

If the tenants, upon being served with a copy of the order of appointment, refuse to attorn, an application should be made to the court to compel them. Upon notice to them they can inform the court whether they are tenants or not. (*Reid vs. Middleton, Turner & Russell*, 455; *Hobhouse vs. Hollcombe*, 2 De Gex & Smale, 208.)

When the owner of the estate is in possession of a part of the premises, the course is to make an application that such owner deliver possession to the receiver. The receiver cannot distrain upon the owner, as he is not his tenant. (*Griffith vs. Griffith*, 2 Merivale, 401.)

When a party is in possession without his rent being fixed, and a receiver is appointed, application should be made that an occupation-rent be settled (by a reference if necessary), and that the party pay such rent to the receiver.¹

The usual order directs payment of rents in arrears, as well as of those which are to accrue.²

The statute of May 13, 1846 (Laws of N. Y., ch. 274) has abolished the remedy by distress. By the third section, however, a right to rents is given to a grantor or lessor in default of a sufficiency of goods and chattels whereon to distrain, for the satisfac-

¹ *Reid vs. Middleton, Turner & Russell*, 455.

² *Simmonds vs. Lord Kinnaird*, 4 Vesey, 747; 2 *Daniel's Practice*, 1606.

tion of rent due, upon certain conditions ; and the grantees of demised premises or rents and the assignees of the lessor have the same remedy given them. I presume a receiver would be included in the terms.

In *Lorillard vs. Lorillard* (4 Abbott, 210) the court say, that the receiver should (in a certain event) immediately proceed to eject the tenant and occupants under him, by an action to recover the lands and their profits, or in such other way as he may be advised. It was not proper then to say whether the court could not give summary relief against the tenant, as one holding under the court and subject to its jurisdiction.

9. Continuing and finishing business.—Although the general rule and course of the court is, that a receiver shall promptly proceed to dispose of all the property when a sale is properly sought, there are cases in which the interests of all parties require that a business should be continued for a period of time, and especially if necessary to finish up materials in process of being manufactured.

In *Crane vs. Ford* (Hopkins Rep. 114) a receiver had run a steamboat for two years. The court expressed disapprobation of the course, and ordered a sale.

In *Marten vs. Van Schaick* (4 Paige C. R. 479) the partnership effects were a printing establishment, and the subscription list and advertising custom. The receiver was directed to sell the establishment without delay, and to carry on the business in the mean time, so that the good-will might be secured to the purchasers. The defendants were allowed to superintend the editorial department, under the direction of the receiver.

In *Dayton vs. Wilkes* (17 Howard's Pr. Rep. 510), where the property was a newspaper, called *Porter's Spirit of the Times*, the receiver was allowed a specified time to carry on the paper, before he should sell the establishment.

And in *McCarthy vs. Drake* (9 Abbott, 167, n.) the referee was directed to inquire and report what business the receiver should be permitted to prosecute or finish, with his reasons therefor.

10. Removal.—In cases of misconduct or neglect of duty, a receiver may be removed and another appointed.

Thus a receiver had neglected to render and pass his account, and pay in the balance, as directed by the general order in Ireland. An attachment had issued against him, and he was in con-

tempt. An order was made for his removal, and for the appointment of a new receiver, at the cost of the former. (Smith on Receivers, 189.)

Liberty may also be obtained, on notice to the sureties, to put the bond in suit. (Ibid.)

A receiver having become blind, and incapable of performing the duties of his office, the court discharged him, and allowed him the costs of the application and of vacating his recognizance.¹

Mr. Edwards² cites the case of *Purdy vs. Rapelye*, 1835, where the receiver was obliged to go to Europe on business, to remain a year. The Chancellor, on petition, allowed him to pass his accounts, be discharged, his recognizance vacated, and a new receiver appointed. The costs of the application were allowed out of the fund.

If a receiver has been appointed over property unnecessarily large for all the purposes of the action and rights of the parties, his power may be restricted to what will be sufficient. (*Magrath vs. Veitch*, 1 Hogan, 110.)

In *Beers vs. The Chelsea Bank* (4 Edw. Rep. 277) the Vice-Chancellor said that it was by no means a matter of course to discharge a receiver on his own application. He must show some reasonable cause why he should be relieved from duties he has voluntarily assumed.

In *Griffith vs. Griffith* (2 Merivale, 401) there was a petition to remove a receiver, the parties joining in it. The Lord Chancellor held that this fact made no difference. The sureties could not be discharged from the obligations they had assumed. The application was only to be listened to when it was for the benefit of the parties in the cause, or something of that kind.

Upon the death of a receiver his representatives may have an order that his accounts be passed and recognizance vacated. (Smith on Receivers, 191.) In *Gordon vs. Badcock* (6 Beavan, 157) this course was taken.

In *Jenkins vs. Bryant* (7 Simons, 171) the court declared that it had not power to compel the executors of a receiver to bring in and pass the accounts, and pay the balance out of the assets.

11. Abatement.—The abatement of a cause by the death of

¹ *Richardson vs. Wood*, 6 Mad. Ch. Rep. 266.

² On Receivers, p. 661, 2d edition.

parties, or otherwise, does not affect the office of a receiver. (Smith on Receivers, p. 189.)

In *Woods vs. Creagh* (1 Hogan, 174) it was decided that an abatement by the death of a co-plaintiff, was not a ground for discharging a receiver. There should be a motion that the plaintiff revive the cause in ten days, or the receiver stand discharged. This authority is recognized by Chancellor Walworth, in *McCorker vs. Brady* (1 Barb. Ch. Rep. 329, 346).

In *Moore vs. The Marquis of Donegal* (11 Irish Rep. 412) it was held that the extension of a receiver of tenant for life (a party who had died) to the estate of the inheritance, was not prevented by the abatement.

12. Accounting.—The regulations in England and Ireland as to the duty of a receiver to account, have long been fixed by general orders. It is his duty, expressly enjoined, to pass them annually, unless some other direction is contained in the order appointing him.¹

The order of the 15th of December, 1792 (Beams' Orders, 454), of the 23d of April, 1796 (*ibid.* 461), and Lord Lyndhurst's order of 1828, are stated in Hoffman's Office, &c., of Masters in Chancery, p. 157. Lord Redesdale's order in the Irish Chancery of 1804, is also set forth, p. 160. It is to be found in 2 Sch. & Lefroy, 732, Appendix. It is remarkable for its great practical utility.

Chancellor Lansing, in 1806, adopted a rule upon this subject. By the 45th of his rules, all guardians, receivers, and committees of lunatics, who have been or may be appointed by this court, if the clear annual value of the estate committed to their management exceeded the sum of \$300, were once in every three years, and if of less value, once in every two years, in the terms of March and September, to exhibit to the court, and file with the Register or Assistant Register, an account of their guardianships or other trusts, and of the balance of moneys that might be then in their hands respectively; that the court might take proper order for the disposition and improvement thereof. That any such guardians, receivers, or committee, might, if disposed so to do, render such account once in every year during either of said

¹ *Seaton on Decrees*, 320, 324; *Jefferys vs. Smith*, *ibid.* 325.

terms; and that the Register or Assistant Register who should enter their appointment, should, upon the appointment of any guardians, receivers, or committees, furnish them with a certified copy of the rule.

Chancellor Walworth, by the 154th, 155th, and 156th rules of 1830, carried out the principle of this rule, adding the important provisions, that the Register or Assistant was to deliver to the Chancellor or Vice-Chancellor, on the first day of term, a list of those who had neglected to file their accounts for more than three months after the limited time, that order might be taken for their removal or prosecution; and that the injunction master in each circuit was to examine the accounts in January in every year, and report whether they were correctly kept, &c.

In 1839, rule 156 was materially added to.

In the rules adopted in July, 1847, under the judiciary act, no regulations of a similar character were adopted, and none now exist. I am not aware of the reasons for this omission.

In practice before the author, orders have sometimes been made, containing a direction that the receiver file his account annually, from the date of his appointment, with the clerk; that all parties be at liberty to examine the same, and to apply to the court for such order relating to the same, as might be proper. No doubt an application, on notice to the receiver and the other parties, may at any time be made for him to pass his accounts before a referee, and such order be made upon the report as shall be proper. The author has known of several such applications in the Superior Court.

It is quite common, in orders of appointment, to direct that any surplus in hand, amounting to a certain sum, be from time to time, as it shall accrue, paid into one of the trust companies in which moneys of the court are placed.

A receiver not paying in balances as directed, may be moved against for a commitment, or his bond may be put in suit.

In *Davis vs. Craycraft* (14 Vesey, 143), upon a motion to commit a receiver who had not paid in a balance according to order, the Lord Chancellor said that a doubt had been expressed whether this course could be taken. Authorities were cited, and he made the order. In another case, on the same day, he made the order that the receiver pay in by a certain day, or stand committed.

The first subdivision of section 1 of the statute relating to contempts (2 R. S. 534), warrants such a proceeding with us.

In the matter of *Seaman* (2 Paige's Ch. Rep. 409), the Chancellor ruled that in cases of neglect of duties prescribed to guardians, receivers, &c., by the rules, they might be proceeded against by attachment, or the bonds would be delivered to the Attorney-General to be prosecuted. He settled the form of an order applicable to such cases.

A delinquent receiver is chargeable with interest on the balances in hand.¹

He may also be removed for his default.²

If a receiver puts the fund out of his control, so that other persons shall be able to deal with it, he guarantees the solvency of those parties, and becomes answerable for any loss that may ensue. However good his intention, the parting with the control, to the extent of giving that control to another, would be enough to make him a guarantee of the fund.

This principle was laid down in *Salway vs. Salway* (2 R. & Mylne, 215; 3 Clark & Finelly, 44). The receiver had agreed with his sureties that the partner of one of them should be so far associated with him, as that the moneys were to be deposited in the names of the sureties and his own, and drawn out by checks drawn by the partner, and signed by the receiver. In effect this was a veto or restriction upon the receiver's control of the deposits.

Chancellor Walworth, in the *Utica Insurance Company vs. Lynch* (11 Paige, 520), laid down the following rules: "It was the duty of a receiver to keep the trust moneys entirely separate and distinct from his own money. If deposited in a bank, the money should be deposited to a separate account, in his name as receiver, to the end that the fund could be at all times identified and traced.

"If a receiver loans out such moneys, even temporarily, to his friends or others it was a breach of trust.

"Like a trustee he will be charged with interest when he mixes

¹ *Fletcher vs. Dodd*, 1 Vesey, jr. 85; ——— *vs. Jolland*, 8 Vesey, 72; *Potts vs. Leighton*, 15 Vesey, 274.

² ——— *vs. Jolland*, *ut supra*.

the trust moneys with his own, and uses them indiscriminately, although he makes no profit from such use.

“A trustee is not allowed to make any profit out of the funds. If he employs them in trade, he will be charged with the whole, profits.

“Stating the accounts with periodical rests, and compounding the interest, is only a convenient mode adopted by the court to charge the trustee with the profits supposed to have been made, where the actual profit beyond simple interest cannot be ascertained.”

13. Compensation.—The Chancellor, by rule 169, adopted the compensation allowed to executors by the Revised Statutes as that to be allowed to receivers. He was not, however, limited to such an allowance as to receivers appointed before the rule. In the case of the Receivers of the Life and Fire Insurance Company, the amount allowed very greatly exceeded the statutory amount.

In *Howes vs. Davis* (4 Abbotts' Rep. 71) Justice Clerk adverted to the statutory provision (2 R. S. 93), and the Chancery rule of 1839, and adopted the construction given to the act by the Chancellor, viz., that one-half the specified rates was to be allowed for receiving and one-half for paying out.

Where a clause was inserted in the order appointing a receiver limiting his allowance to that given to executors and administrators, he can have no greater amount, even although directed to deposit the moneys collected from time to time, which he had done.

If, however, he had rendered periodical accounts, in accordance with the standing rule of the court, he might apply the scale of rates to such accounts successively and separately.

And so, if annual rests were ordered to charge him with interest. (*Bennet vs. Chapin*, 3 Sandf. Supr. Ct. Rep. 673; in the matter of the Bank of Niagara, 6 Paige, 213.)

He is entitled to commissions on the value of assets taken out of his hands upon an order settling the suit. (*Ibid.*, and In the matter of *De Peyster*, 4 Sandf. Ch. Rep. 511.)

Where a receiver had been appointed of an insolvent mutual insurance company, it was held that he was entitled to commissions on the whole amount of the premium notes, whether col-

lected by him wholly, or only assessments upon them to pay the debts, surrendering the rest.¹

A receiver cannot be allowed counsel fees for his own services as such; but counsel fees paid to others for necessary advice and aid in discharging his duties, may be allowed.²

Nor will he be allowed a *per diem* amount for special services.³ If he act as attorney, he will be allowed the taxable fees.⁴

In the case of *Malcom vs. O'Callaghan* (3 Mylne & Craig, 52), the subject of allowanees to a receiver for extra services was much discussed. It was held that his ordinary duty did not authorize him to charge the expenses of journeys to, and of residence in, a foreign country, whilst prosecuting in that country a suit which he was empowered to institute. The expenditure was unauthorized by any previous order, and it turned out to be unprofitable.

In re Montgomery (1 Molloy, 419) was cited, where a receiver instituted proceedings which, being wrong in form, he abandoned, and then took other proceedings in which he was successful, he was not allowed the costs of the abandoned proceedings, although he had acted *bona fide*.

The allowance to receivers of corporations cannot exceed the statutory allowance to executors, &c. (In the matter of the Bank of Niagara *ut supra*). Whether in other cases the court can now go beyond the amount is a question I have not found decided. As before observed, Chancellor Walworth made a far greater allowance where the receivers were appointed before his rule. Whether that rule is now to be deemed the practice in force, so that no single judge could deviate from it, is perhaps a question.

14. Final Discharge.—The receiver continues until decree, which usually disposes of his power, often superseding him, and frequently continuing his office to give effect to the decree.

Though it is stated in general terms that a receiver is superseded by a decree, unless expressly continued,⁵ it is not to be understood that the decree of itself produces this result, unless it contains a direction to that effect.

¹ Van Beuren *vs.* The Chenango Mutual Insurance Co., 12 Barbour, 671.

² *Ibid.*

³ *Ibid.*

⁴ *Ibid.*

⁵ 2 Daniel's Pr. 1629.

A motion or notice to all the parties should be made for that purpose. This is at least the better practice.

In *Gibson vs. Lord Montfort* (Seton on Decrees, 330) the receiver was continued by the decree, with directions that his accounts be passed.

In *White vs. Westmeath* (2 Molloy, 128, 133), the Lord Chancellor said: "The court could say this (but could it duly say more than this), when called on to dismiss the bill, that it would keep the fund, and give an opportunity to the incumbrancer to file his original bill, and let the plaintiff, as he is entitled to, dismiss his bill."

And in *Murray vs. French* (2 Molloy, 497) the Lord Chancellor held, that if prior creditors, parties in a cause, had claims on an estate, and the court by appointing a receiver interferes with their rights, though the plaintiff may dismiss his bill, yet the court will protect the rights of such creditors by continuing the receiver, putting the persons so protected under terms to file a bill forthwith.

See also *Whiteside vs. Prendegraft* (2 Barb. Ch. Rep. 472).

In *Hubbard vs. Guild* (2 Dner's Rep. 685) these cases were cited; and it was ordered that the receiver should not pay out any moneys in his hands without notice to certain intervening parties who had petitioned for payment—such parties to be at liberty to institute actions against the receiver as advised, and making such other persons parties as they should see fit.

Upon proceedings supplementary to execution.

Section 292 of the Code has provided for three cases, in which proceedings for enforcement of judgment, termed supplementary to execution, may be resorted to before a judge, out of court. One, upon the return of the execution unsatisfied, in whole or in part, for the party to appear and answer concerning his property; another, after an execution against property has been issued, upon proof that the judgment-debtor has property, which he unjustly refuses to apply towards the satisfaction of the judgment; and lastly, under circumstances of danger of the debtor leaving the State, or concealing himself, an order of arrest may be had, and security obtained upon an examination.

Section 298.

Then by section 298 it is provided :

[1.] "That the judge may also, by order, appoint a receiver of the property of the judgment-debtor, in the same manner, and with the like authority, as if the appointment was made by the court, according to section 244."

[2.] "But before the appointment of such receiver, the judge shall ascertain, if practicable, by the oath of the party or otherwise, whether any other supplementary proceedings are pending against the judgment-debtor; and if such proceedings are so pending, the plaintiff therein shall have notice to appear before him, and shall likewise have notice of all subsequent proceedings in relation to said receivership."

[3.] "No more than one receiver of the property of a judgment-debtor shall be appointed."

[4.] "Whenever the judge shall grant an order for the appointment of a receiver of the property of the judgment-debtor, the same shall be filed in the office of the clerk of the county where the judgment-roll in the action, or transcript from justice's judgment, upon which the proceedings are taken, is filed; and the said clerk shall record the order in a book to be kept for that purpose in his office, to be called, 'Book of Orders appointing Receivers of Judgment-Debtors,' and shall note the time of the filing of said order therein. A certified copy of said order shall be delivered to the receiver named therein, and he shall be vested with the property and effects of the judgment-debtor, from the time of the filing and recording of the order as aforesaid."

[5.] "The receiver of the judgment-debtor shall be subject to the direction and control of the court in which the judgment was obtained, upon which the proceedings are founded; or if the judgment is upon a transcript from justice's court, filed in the county clerk's office, then he shall be subject to the direction and control of the county court."

The Code of 1848 (§ 253) contained only the clause above marked [1].

In 1851 the clauses marked [2] and [3] were added; and in 1862 those marked [4] and [5]. The latter went into effect the 13th of May, 1862.

[1.] The part of section 244 referred to in the first clause of the present section, authorized the court to appoint a receiver "when an execution has been returned unsatisfied, and the judgment-debtor refuses to apply his property in satisfaction of the judgment."

If creditors bill superseded.—There is much force in the argument that the power of the court to appoint a receiver, or to entertain an action for the purpose of discovering and applying property, similar to the ordinary judgment-creditor's bill of the Chancery system, is restricted to the special case specified; and the 292d and 298th sections must be resorted to in other cases. Some authorities go further, and deny the right to commence such an action at all.

The cases are as follows:

In *Quick vs. Keeler* (2 Sandf. S. Ct. Rep.), and in *Dunham vs. Nicholson* (Ibid. 636), it was held, that when the execution was returned before the Code took effect, the old remedy by action was to be pursued. *Hammond vs. The Hudson River Iron and Machine Co.* (20 Barbour, 378), is a General Term decision, that an action will lie against judgment-debtors and their alleged fraudulent assignees.

In *Taylor vs. Persse* (15 Howard's Pr. 419) it was considered by Justice Clerke, that by the operation of section 468 the former judgment-creditor's suit, under the Revised Statutes, was superseded; and proceedings under section 292 substituted therefor. An action to set aside a fraudulent transfer was, however, clearly proper. The learned judge considers that *Quick vs. Keeler*, and *Dunham vs. Nicholson* (*ut supra*), tend to support this conclusion.

Lent vs. McQueen (15 Howard, 313) appears to be a decision the other way, and *Colton vs. Doughty* (12 Howard, 457) is expressly so.

When title vests.—A receiver appointed in these proceedings became, before the amendment of 1862, vested with the title to personal estate, from the time of his appointment; but it seems not to real estate until a conveyance to him.

In *Porter vs. Clark* (5 Selden, 148) Justice Willard stated the question to be, whether a receiver appointed under the sections 292 to 298 could, after perfecting his appointment, maintain an action in his own name, to set aside an assignment of real and personal property made by the judgment-debtor, on the ground

of fraud, without having received an assignment from such debtor.

The cases before the Code declaring the power to sue, when the transfer was of personal property, were noticed, and the rule recognized. It was admitted that before the Code real property did not pass by the order, but an assignment was necessary.

The statute of April 28th, 1845 (Session Laws, 90) was also noticed; and Chancellor Walworth's decision in *Wilson vs. Wilson* (1 Barb. Ch. Rep. 594), that the act was not broad enough to transfer the title to real estate without an actual conveyance. The judge considered, however, that the Code had removed this difficulty, and the order operated to transfer real as well as personal property.

In *Edmonston vs. Lyde* (16 N. Y. Rep. 543), Justice Harris uses language involving the proposition that an order operates to transfer both classes of property.

Yet, in the *Chautauque County Bank vs. Risley* (19 N. Y. Rep. 374), it is expressly stated, that although personal estate becomes vested from the time and by virtue of the order, real estate is only transferred by virtue of a conveyance to the receiver, which the court has power to compel; and in this way the satisfaction is worked out.

And in *Moak, Receiver, vs. Coats* (33 Barb. 498) this proposition was recognized as law by the General Term of the Sixth District. *Porter vs. Williams & Clark* was commented upon and distinguished.

We may conclude, that under these authorities a receiver, without assignment, might impeach a fraudulent transfer by action, and yet that, as to third parties and their rights, real estate remains in the debtor until a conveyance.

See, also, as to personal estate and equitable interests, *Lottimer vs. Lord* (4 E. D. Smith's Rep. 183); *West vs. Frazer* (5 Sandf. S. Ct. Rep. 654); *Wilson vs. Allen* (6 Barbour, 542).

But the amendment of section 298, by the act of 23d of April, 1862, taking effect on the 13th of May, seems, for future cases, to dispose of this question. It is provided that when the judge shall grant an order for the appointment of a receiver of the property of a judgment-debtor, the same shall be filed in the office of the clerk of the county where the judgment-roll in the action, or

transcript from justice's judgment upon which the proceedings are taken, is filed.

“ And the said clerk shall record the order in a book to be kept for that purpose in his office, to be called ‘Book of Orders appointing Receivers of Judgment-Debtors,’ and shall note the time of the filing of said order therein. A certified copy of said order shall be delivered to the receiver named therein, and he shall be vested in the property and effects of the judgment-debtor, from the time of the filing and recording of the order as aforesaid.”

It cannot be doubted that the term *property* was meant to include real estate. The definition of the word in section 464 includes property, real and personal.

There were some cases before the amendment of 1862, as to the question of vesting, which deserve notice.

In the case of *Steel vs. Sturgis* (5 Abbotts' Rep. 442), a case of partnership, Clapp was, by order, appointed receiver of the property of the firm, but before entering upon the discharge of his duties he was to give security. Between the date of the order and filing the undertaking, an execution was levied by the sheriff. The title of the receiver was held paramount.

In *Rutter vs. Tallis* (5 Sandf. Supr. Ct. Rep. 612), it was laid down, that when an order of reference is made, and a receiver subsequently appointed, his title vests by relation from the date of the order of reference, and attaches upon all the property to which the receivership could properly extend, as if the receiver had been named in the order. He would take priority over an execution creditor, becoming such between the order of reference and that of appointment.

In *Lottimer vs. Lord* (4 E. D. Smith, 183) it was held, that a receiver when his appointment was complete, took title by relation to the order, as between the creditor prosecuting and the debtors. This was a partnership case.

In *Rich vs. Loutrel* (9 Abbott, 356) the Supreme Court differed from *Rutter vs. Tallis*, and considered that the rule was fixed otherwise, by the General Term, in the case of *The American Gutta Percha Co.* (9 Abbott, 79).

In *Voorhees vs. Seymour* (26 Barbour, 581) an order was made for an examination in April, 1860; and one appointing a

receiver on the 6th of September, 1860; but the security required was not filed until the 19th of September, 1860. The adverse claimants relied upon a lien on the stock in question, asserted in a suit commenced in July.

It was held, *first*, that the proceedings for an examination of the judgment-debtor, created no lien on property; and next, that until an appointment of a receiver was consummated, no interest passed. It was consummated on the 19th of September.

And in the *Artizan's Bank vs. Treadwell* (34 Barbour, 553), the General Term ruled, that an order appointing a receiver could not, as against third persons, date or relate back beyond its date. It was irregular and improper to insert a clause in the order, giving it an effect back by relation.

I presume that the amendment of 1862 supplies here, also, a definite rule; that it is exclusive in its nature, and makes the vesting dependent upon, and to date from, the filing and recording of the order.

In *Booth vs. Clark* (17 Howard's U. S. Rep. 322), it was decided that a receiver, appointed under a judgment-creditor's bill in the State of New York, but without an assignment made to him, could not sustain an action upon a claim of a debtor against a foreign State. There were creditors of the judgment-debtor contesting the receiver's right.

Whether the statutory assignment now created by the amendment of 1862, would make any distinction in the result, may admit of very great doubt. And it seems that it would still be prudent at least, to compel an assignment wherever it is practicable.

Mode of appointing.—See this subject considered *ante*, title "Mode of appointment," p. 496. I may observe here, that I have always supposed an order of reference *to appoint* a receiver in those cases, and an appointment by a referee, to be irregular if not void.

If property must be discovered.—It has been held in some cases that the creditor may have a receiver, although he has failed to discover any property upon the examination of the judgment-debtor.

In *Myres' case* (2 Abbott, 476) Mr. Justice Davies held that it was well settled that proceedings under this chapter were a sub-

stitute for a creditor's bill, as known under the former chancery system. (*Sale vs. Lawson*, 4 Sandf. Rep. 718.) It was beyond doubt that under the rule in Chancery a receiver would be granted without any proof of there being property to protect. (*Bloodgood vs. Clark*, 4 Paige, 474; *Browning vs. Betts*, 8 Paige, 568.) The language of the Chancellor in *Fitzhugh vs. Everingham* (6 Paige, 29) was also cited:

"In cases of this kind, as the defendant is enjoined from interfering with the property himself, he can have no honest motive for resisting the application for a receiver. For if he has property it is for his interest that it should be preserved during the litigation; and if he has none, there will be nothing for the receiver to do, and the complainant must pay the cost of the appointment."

In *Myres' case* the defendant was enjoined; and the order was that T. H. B. be appointed receiver, on his giving security in \$500; that the defendant attend and execute an assignment of all his property, debts, and effects which he had on the day the injunction order was served."

In *Webb vs. Overmann* (6 Abbott, 92) the same learned judge repeats this rule; but some interests, though sworn to be valueless, were discovered in that case.

In the Superior Court, as far as the author's practice, and that of his associates to his knowledge, extended, the course was different. But it was the course there, when the plaintiff had wholly failed in discovering property, to discharge the injunction order; and hence the ground for appointing a receiver failed.

The Chancery jurisdiction, we are to remember, rested upon sections [38] and [39] (2 R. S. 174); and the court could decree satisfaction out of any property discovered by the proceedings in Chancery.

But the allegations of the complaint were general as to the debtor's possession of property. It was not necessary to specify items of property. See the 189th rule of Court of Chancery, and *McElwain vs. Willis*, 3 Paige, 505.

The Chancellor indeed, in *New vs. Bame* (10 Paige, 502), decided, that an answer denying that the defendant had any property or any interest in property or choses in action, was not enough to entitle him to a dissolution of the injunction.

Certainly, however, if the cause came to a hearing, and nothing had been discovered, the bill would be dismissed, the injunction fall, and the receiver, on a motion, be discharged.

Now, the proceedings under these sections of the Code, not only give an examination orally in lieu of the discovering part of a bill, but allow the examination of witnesses in the same manner as upon the trial of an issue. (§ 295.)

When the plaintiff, after resorting to these modes of inquiry, or only to the examination, fails to discover property, the proceedings fail, as a suit would have failed; and the defendant must be entitled to a dismissal.

Order not impeachable collaterally.—The regularity of an order appointing a receiver cannot be questioned collaterally; for example, in an action brought by a receiver, or any one deriving title under him.

Thus, in *Tyler vs. Whitney* (12 Abbotts' Rep. 465; S. C. 33 Barb. 327), it was held that a third person sued by a receiver as a debtor to the judgment-debtor, the latter having consented to the appointment, could not avail himself of any irregularities attending the appointment, which did not affect the jurisdiction of the court or officer who made the appointment.

One objection was, that the execution had been returned before the sixty days had expired. This could not be raised collaterally. It was only available on a motion to set aside the execution. If the debtor does not make the objection, no other person could do so. And see — *vs. Levy* (10 Abbott, 426).

It was held in *Sacket vs. Newton* (10 Howard, 561), a case under the second clause of section 292, that the affidavit on which the order was grounded was not a compliance with the statute so as to confer jurisdiction, and an appearance and voluntary examination did not waive the right to object.

Upon the subject of what amounts to a want of jurisdiction which may be set up at all times, and is not waived by consent, and what may be waived, or is personal, see the opinion in *Bangs vs. Deckinfield* (18 N. Y. Rep. 592).

[2.] By the next clause of section 298, the judge is to ascertain, if practicable, whether any other supplementary proceedings are pending against the judgment debtor, in which case the plaintiff therein is to have notice to appear, and notice of all subsequent proceedings.

There was no such clause in the Code until 1851.

The 194th rule of the Court of Chancery was similar in its provisions to this clause of the Code.

In *Todd vs. Crooke* (4 Sandf. Sup. Ct. Rep. 694) it was ruled that although other creditors were to have notice of the application for a receiver, the Code required nothing more. It did not require that a copy of the examination which had been taken should be served upon the other creditors, with the notice.

The defendant ought to have notice also.

[3.] **Only one receiver.**—By the next clause of this 298th section, no more than one receiver of the property of a judgment debtor shall be appointed.

Extending receiver.—By the 194th rule of the Court of Chancery, where another suit was commenced after the appointment of a receiver, the same person may be appointed in such subsequent suit, and shall give such further security as the master executing the last order shall direct.

In *Banks vs. Potter* (Common Pleas, 21 Howard Rep. 469) the judge said: "If proceedings supplementary be afterwards instituted upon judgments in other courts, the same receiver must be appointed; and the effect of the appointment is to give to the creditors, in their proceedings, an equitable right to the distribution of the debtor's effects, which must be according to their respective priorities."

In *Irving vs. Waller* (1 Hogan, 259) the Master of the Rolls said: "When two courts, possessing concurrent jurisdiction, are called upon to adjudicate respecting the same property, it is impossible to prevent their clashing, unless their proceedings are regulated with reference to the respective priorities of the parties before them."

[4.] The first clause of the addition of 1862 to this 298th section, has been before stated and commented upon. (*Ante*, p. 521.)

It may be observed, that the language seems to imply that the receiver does not become vested with the property until the order is recorded as well as filed. An interval may sometimes occur between the two acts.

[5.] The receiver of the judgment-debtor shall be subject to the direction and control of the court in which the judgment was obtained upon which the proceedings are founded; or if the judgment is upon a transcript from justice's court, filed in County

Clerk's office, then he shall be subject to the direction and control of the County Court.

Before the amendment the receiver was subject to the control of the judge appointing him.

Thus, in *Webber vs. Hobbie* (13 How. Pr. Rep. 382), Mr. Justice Smith says: "The proceedings supplementary to execution were designed to supersede the creditor's bill of the Court of Chancery, commonly in use before the Code. So far as the judgment debtor alone is concerned, it suffices for that purpose.

"After the proceedings have been duly instituted, the jurisdiction must remain until the examination of the debtor is completed, and all orders made by the judge in respect to the property of the judgment-debtor are fully executed. The receiver, too, must be subject to the order of the judge. He may be required to account for the property which may have come to his hands; and I think the jurisdiction of the judge must necessarily continue until the judgment-creditor is paid, or all the funds or property in the hands of the receiver, applied on the judgment, are exhausted.

"Until the judge make the final order for the application or appropriation of the funds in the hands of the receiver, his jurisdiction remains."

Security.—(See *ante*, under this head, p. 501.)

Whom the receiver represents.—By the 193d rule of the Court of Chancery the receiver, upon a judgment-creditor's bill, was to hold the property and effects of the debtor for the benefit of all the creditors who had commenced or should commence similar suits during the continuance of his trust, to be disposed of according to their legal or equitable priorities.

He does not merely represent the debtor and his estate, but is the trustee, acting for the court, to collect and preserve the property for distribution among those persons who shall be adjudged to be entitled, according to their rights and liens.

"The property is not deemed the property of the party in the first proceedings, at whose instance he was appointed, but it is in *custodia legis* for those who shall establish a right to it according to their respective priorities." (Daly, First Judge, in *Banks vs. Potter*, 21 Howard's Rep. 469.)

In *Bostwick vs. Beizer* (10 Abbotts' Rep. 197) the same rule was stated.

These priorities, under the course in chancery, were settled by the respective dates at which the bills were filed. (*Burrall vs. Leslie*, 6 Paige's Rep. 445; *Beck vs. Burdell*, 1 Paige, 305; *Corning vs. White*, 2 Paige, 567.)

In *Banks vs. Potter* (*ut supra*) the learned judge states that the order of distribution is according to the respective priorities in obtaining the appointment of a receiver. He cites *Kavanagh vs. Murphy* and others.

A judgment-creditor who had commenced an action to set aside a transfer of property as fraudulent, making the assignor and assignee parties, acquired a prior right to the property in question over a judgment-creditor, obtaining an order for examining the debtor, which was served on the same day as the action was commenced; and under which a receiver was appointed.

This was held in *Field vs. Sands* and others (Gen. Term Superior Court, June 1, 1861). The rule in chancery that the creditor filing the first bill, was entitled, was noticed. It was held that the proceedings against the debtor, and appointment of a receiver after examination, could not create a lien upon the assigned property, the assignee not being a party. A judgment-creditor's bill against the debtor alone would not give such priority. (1 Paige, 637.) And the supplementary proceedings could not affect property vested in a third person. The receiver only obtained the power of litigating the validity of the transfer by an action to be brought.

The receiver who had been appointed on the proceedings was appointed receiver in the judgment setting aside the transfer, and an assignment directed to be made by the assignee, and that the receiver sell the property and pay the amount.

In *Voorhees vs. Seymour* (26 Barbour, 569) the court cite some authorities, and say: "The implication from these decisions is very strong, if indeed the conclusion is not irresistible, that until the order for a receivership is made, and the appointment perfected, no interest whatever of the debtor passes to the receiver, and no title to anything whatever is acquired by him. It would be giving the naked order for an examination a very far-reaching effect, to hold that all the equitable assets of the debtor passed out of him *eo instanti* the order for his examination was made; and although there were no other party in existence who could

take, they were to be held in abeyance until, perchance, at some time thereafter a receiver should be appointed."

The learned judge proceeds to say, that as between two or more creditors who are upon the chase *pedibus manibusque* after the equitable assets of the debtor, the one who procures the first order may acquire an inchoate lien entitling him to ultimate preference, provided he pursues his remedy diligently, and consummates his proceedings by the appointment of a receiver.

In the case of R. D. Livingston, receiver (Jan. 1861, Special Term Superior Court), he had been first appointed upon proceedings under several judgments docketed the same day in the County of Westchester. His receivership was subsequently extended, upon similar proceedings taken under other judgments by different creditors at different times. The receiver brought an action to set aside a conveyance of land in the County of Westchester. He obtained a judgment declaring the conveyance void as to the creditors and the receiver, and directing him to make sale of the premises; and after paying certain amounts, to retain the balance for direction of the court.

Upon his petition it was held that the proceeds were to be divided according to the dockets of the judgments creating liens upon the lands.

It was observed, "that a judgment declaring conveyances null, fraudulent, and void, and setting them aside in favor of creditors, and especially in favor of the receiver in his own action, is, perhaps, equivalent to a conveyance by the debtor. For the present, it would be assumed to be so.

"But, in the interim, where is the title? In the grantee, as far as relates to the grantor and his heirs. But as to creditors, it must be in the grantor.

"The provision of the statute is, that every conveyance of any estate or interest in lands made with the intent to hinder, delay, or defraud creditors, as against the persons so hindered, delayed, or defrauded, shall be void. (2 R. S. 137, § 1.)

"In this view there was a legal lien upon the lands in Westchester County, in favor of all the judgment-creditors whose judgments were docketed in that county. (Code, § 282. See 2 R. S. 360, and *Buchan vs. Sumner*, 2 Barb. Ch. Rep. 165.)

"In the *Chautauque County Bank vs. Risley* (4 Denio, 480),

Justice Jewett says: 'The assignment to the trustees therefore being considered void, there was nothing to prevent the judgments docketed in May and July, 1838, from being regarded as liens upon the premises.' I understand the decision in the Court of Appeals to support this view."

The amendments of 1862 have definitively fixed when the property of the debtor passes from him to a receiver; and it seems to me the best conclusion that priorities, as to personal estate, are to be settled according to the orders of appointment. So much of the property vests in the receiver, as trustee of the creditor at that time, as is necessary to pay him; and so as to each other creditor in succession.

Powers and duties.—The authority to institute an action to set aside a fraudulent transfer which was decided to exist in such receivers, in *Porter vs. Williams*, is recognized and placed beyond reasonable doubt by the act of April, 1858 (ch. 314). See this statute stated, under the general head of Powers of Receivers, *ante*. And see the same head, as to the powers and duties of receivers generally.

The present 92d rule of the Supreme Court prescribes certain duties and gives certain rights in this particular case. It provides that every receiver of the property and effects of the debtor shall, unless restricted by the special order of the court, have general power and authority to sue for and collect all the debts, demands, and rents belonging to such debtor, and to compromise and settle such as are unsafe and of a doubtful character. He may also sue in the name of a debtor, where it is necessary or proper for him to do so; and he may apply for and obtain an order of course that the tenants of any real estate belonging to the debtor, or of which he is entitled to the rents and profits, attorn to such receiver and pay their rents to him. He shall also be permitted to make leases from time to time, as may be necessary, for terms not exceeding one year. And it shall be his duty, without any unreasonable delay, to convert all the personal estate and effects into money; but he shall not sell any real estate of the debtor, without the special order of the court, until after judgment in the cause. He is not to be allowed for the costs of any suit brought by him against an insolvent from whom he is unable to collect his costs, unless such suit is brought by order of the court, or by the con-

sent of all persons interested in the funds in his hands. But he may, by leave of the court, sell such desperate debts, and all other doubtful claims to personal property, at public auction, giving at least ten days' public notice of the time and place of such sale.

Section 299.

By section 299 of the Code, "if it appear that a person or corporation alleged to have property of the judgment-debtor, or indebted to him, claims an interest in the property adverse to him, or denies the debt, such interest or debt shall be recoverable only in an action against such person or corporation by the receiver; but the judge may by order forbid a transfer or other disposition of such property or interest, till a sufficient opportunity be given to the receiver to commence the action, and prosecute the same to judgment and execution; but such order may be modified or dissolved by the judge granting the same, at any time, on such security as he shall direct."

The case of *Rodman vs. Henry* (17 N. Y. Rep. 483) is an exposition of this provision. Upon an examination of a judgment-debtor, an order was made for the delivery by him of certain property which he swore belonged to another person, under a mortgage; that such person had taken actual possession, and he had control of part of the goods only as her agent. On proceedings against him for contempt, those facts were fully made out. An order allowing an attachment was reversed by the General Term, and such reversal sustained by the Court of Appeals.

The court say: "The sections cited, as well as section 294, which directly bears upon the construction of section 299, precludes the idea that a third person, who claims the property as his own, is to be placed, in virtue of these proceedings, in a position where his rights can only be asserted in a suit in which he is plaintiff. The obvious purpose of the series of provisions is, to give the creditor an immediate and summary remedy against the debtor's property, but not to permit the rights of third persons to be brought into litigation, except in a regular way by suit. A receiver should assert any right against him."

In *Edmonston vs. McLeod* (19 Barbour, 357) it was held that an action to recover a debt due to the judgment-debtor from a third person, or to reach property in his possession alleged to belong to the judgment-debtor, could only be brought by a receiver. It could not be instituted by the judgment-creditor himself.

In *Patten vs. Connah* (13 Abbott's Rep. 418) a third person, upon being called before a judge under this 299th section, admitted that he owed a sum to the judgment-debtor. An order was made that he pay over the money. He refused, and a suit was brought by the creditor. It was held that the action could not be sustained. A receiver must be appointed.

Section 244.

Provisional Remedies.

Under this head, Chapter 5, § 244, includes the title *Receivers, deposit of money, &c., in court, and other provisional remedies. Judgment for sum admitted due.*

The title (Title 7) is, "of the provisional remedies in civil actions;" and why receivers did not make a separate chapter, and these other remedies separate chapters, being wholly distinct in their nature, is not apparent.

The first clause of the section, after providing for receivers, is as follows:

[A.] **Payment or delivery into court.**—"When it is admitted by the pleading or examination of a party, that he has in his possession or under his control any money or other thing capable of delivery which, being the subject of the litigation, is held by him as trustee for another party, or which belongs or is due to another party, the court may order the same to be deposited in court, or delivered to such party, with or without security, subject to the further direction of the court."

This provision is found in the Amended Code of 1851, and has remained unaltered since.

The provision now considered embraces the subject of payment of money into court, an important branch of the chancery practice. (See 2 Daniel's Practice, 1636; 1 Hoffman's Pr. 319.)

In commenting upon this clause, Mr. Justice Clerke says: "That it contemplates the admission of the whole claim, and re-

lates to specific property, whether money or anything else, that could be traced or identified, which it is alleged the defendant unjustly detains; or money which is not the subject of a demand, and arising from the breach of an ordinary contract.” (*Lane vs. Losee, &c.*, 11 Howard Pr. Rep. 360.)

In *Buchan vs. Casey* (4 Sandf. Sup. Ct. Rep. 706) the defendant was surety for the payment of the plaintiff's rent, and the plaintiff had deposited with him \$150 to be applied on account. It was considered that the defendant held this money as a trustee, and was bound to pay it in, or obtain a receipt for so much rent.

When the application is against an executor or trustee, the admission of a certain sum being in hand is sufficient. It need not appear that the fund is in danger or insecure.¹

Money in the hands of a banker, or of a mercantile house of which the defendant is a partner, is considered, for such an application, as in the hands of the defendant.²

It was decided in our courts that money paid in under an order of court was a mere security, and not part payment; and although invested in stock on the application of the complainant, a loss on the stock must fall on the defendant.³ However, it is now provided by statute (2 R. S. 171, § 21) that the party bringing money into court, pursuant to any order, shall in all cases be thereby discharged from all further liability, to the extent of the money so paid into court.

The court will not, in general, order interest to be paid upon the amount admitted due, but the principal only.

In *Wood vs. Downes* (1 Ves. & Bea. 49), under a decree for an account, the defendant put in his examination to interrogatories, and set forth the specific sums paid and received, but omitted to cast them up, or strike the balance. Upon an affidavit of the plaintiff's solicitor, stating he had struck the balance and computed the interest, a motion was made that the aggregate sum should be paid into court. A case of *Fairly vs. Freeman* (not re-

¹ *Strange vs. Harris, Executor, &c.*, 3 Br. C. R. 365; *Blake vs. Blake*, 2 Sch. & Lef. 26; *Rothwell vs. Rothwell*, 2 Sim. & St. 217.

² *Johnson vs. Asten*, 1 Sim. & St. 73.

³ *Clarkson vs. Depeyster, Hopkins*, 505; affirmed, 2 Wendell, 77. See, also, *Ambrose vs. Ambrose*, 1 Cox Ca. 194; *D'Oyley vs. Countess of Davis*, *ibid.* 206; *Ridman vs. Blake*, 1 Hogan Rep. 158.

ported) was cited. Lord Chancellor: "I certainly do not recollect any instance in which the court has gone this length upon motion merely. In the case of *Fairly vs. Freeman* I went on a different ground, taking the answer to be, that the defendant had received the £2,000, and admitting that he had made interest to a greater amount than I directed him to pay. I am unwilling to carry the practice further than it has been carried." Order to pay in the principal only.

In the case of *Clarkson vs. Depeyster* (Nov. 18, 1823, MSS.) the court refused to order the payment of interest on the principal sum.

Where an executor admitted that he had received certain sums, but said he had paid money on account of the estate, without specifying the amount, he was allowed to verify the amount by affidavit, and ordered to pay the actual balance only into court. (4 Sim. Rep. 359.)

Affidavits are admitted after answer, to be read in support of a motion to pay purchase money into court. Thus, in *Bradshaw vs. Bradshaw* (2 Merivale, 492), there was a bill to enforce the performance of a contract respecting the purchase of real estate. After answer a motion was made for payment of purchase money into court, upon affidavits stating acts of ownership by the purchaser since he was let into possession.

The Lord Chancellor said: "It was now quite decided that, upon motions of this sort, affidavits of collateral circumstances might be read, and that it was a practice to be encouraged, as it shortened pleadings. See, also, *Crutchley vs. Jerningham* (2 Merivale, 502).

As to the necessity of an explicit admission of a definite sum being due, see *post* [c].

[B.] The next clause is: "Whenever, in the exercise of its authority, a court shall have ordered the deposit, delivery, or conveyance of money or other property, and the order is disobeyed, the court, besides punishing the disobedience, as for contempt, may make an order requiring the sheriff to take the money or property, and deposit, deliver, or convey it, in conformity with the direction of the court."

As to this clause, Mr. Justice Clerke observed: "This evidently also relates to specific money or other property, or money

which is not the subject of a demand arising from the breach of an ordinary contract." "A person who refuses to restore specific funds entrusted to his custody, or which he has received as an agent, or in any fiduciary capacity, or any other specific thing which he has possession of belonging to another, whether as a bailor or otherwise, not only fails to perform a promise, but is disloyal to his trust; and to him, and not to the ordinary debtor, do these provisions apply."

The last clause, which empowers the sheriff to take and deliver the property, is of much value. The English course of the long process of contempt, and even our own of attachment and perhaps sequestration, is thus dispensed with, and a summary proceeding reaches the property, or specific sum of money.

[c.] **Admission of part of a claim by answer.**—The next clause of this provision is: "When the answer of the defendant expressly, or by not denying, admits part of the plaintiff's claim to be just, the court, on motion, may order such defendant to satisfy that part of the claim, and may enforce the order as it enforces a *judgment or provisional remedy*."

Prior to 1857 the provision did not contain the words "*judgment or*," above italicized. They were introduced in the amendment of that year.

In *Lane vs. Losee*, 1855 (11 Howard, 360), before 1857, Mr. Justice Clerke held, that the provision as it stood could not affect any demand or part of a demand arising on contract, where such contract was within the meaning of the first section of the act of 1831 abolishing imprisonment for debt. It could not thus indirectly operate to abolish a statute sanctioned by the spirit and policy of our legislation for a quarter of a century.

In *Russell vs. Meacham* (January, 1858, 16 Howard, 193), Mr. Justice Harris goes far to express his concurrence with these views. But he considers that the amendment of 1857 has removed all question upon the point. The court may issue an order and enforce it by execution, or in a proper case by attachment. The latter remedy would only be appropriate where the defendant, upon a final judgment, would be liable to imprisonment.

The Court of Common Pleas, in *Merritt vs. Thompson* (10 Howard Pr. Rep. 428, 1855), had taken a somewhat similar view as

Mr. Justice Clerke; intimating, however, that imprisonment might be resorted to where the refusal to pay was contumacious, and not the result of inability.

In *Fosdick vs. Groeff* (22 Howard, 163), a case of money admitted to be due upon a note, part of various claims sued for, a judgment for payment was to be enforced by execution against the property of the defendant.

And such an order was also made in *Guiet vs. Murphy* (18 Howard, 411); and in *Duncan vs. Ainslie* (26 Barbour, 199) judgment was taken for the part admitted.

The admission must be distinct and unequivocal of a definite sum being due, or such facts admitted as necessarily amount to such an admission.

In *Roberts vs. Lane* (4 Sandf. Sup. Ct. Rep. 642) the admission was gathered from the answer to be plain as to a particular sum of partnership funds being due. The fact that there were outstanding claims against the firm was no ground for resisting the application, although it was to require security.

In *Coursen vs. Hamlin* (2 Duer, 513) it was said: "We regard the fifth subdivision of the 244th section of the Code as recognizing and declaring the rule which prevailed in the Court of Chancery, and as going no further. It was clearly settled that an application to pay money into court, or to a party before final decree, or at least before a report of a master, must be founded upon a full and explicit admission in the answer, or examination of the defendant, of a sum being due. The court will not investigate the case to decide whether it is so." (*Nutts vs. Hanson*, 8 Vesey, 68; *Nore vs. Gudgeon*, Cooper's Cases, 304; *Gibert vs. Colt*, Hoffman's Ch. Pr. 323, n.)

In *Quintard vs. Secor* (3 E. D. Smith, 615) the defendants were sued for services and materials alleged to be worth \$651.15, in which sum the plaintiff averred they were indebted to him. The defendants answered, admitting the rendering of services and supply of materials, but denying that they were reasonably worth the sum of \$651.15, but alleging that they were only worth \$572.52, and that no other sum was due from them to the plaintiff than the said sum of \$572.52.

It was held that the Code applied as well where the plaintiff's cause of action was single, and the answer admitted a part to be

due, as where there was more than one cause of action or item of claim, one of which is admitted.

It was also held that the admission was equivalent to an express statement or confession of the sum of \$572.52 being due. The case of *Dolan vs. Petty* (4 Sandf. Sup. Ct. Rep. 673) was disapproved.

In *Merritt vs. Thompson* (10 Howard's Pr. Rep. 428) the action was to recover a sum of money alleged to have been received by the defendant as an agent. An injunction as to certain funds in a banker's hands had been obtained. The defendant obtained an order under which he deposited such funds in the Life and Trust Company.

Upon the coming in of the answers the plaintiff obtained an order for payment of \$2,673.34 out of the money so deposited. The defendant annexed a statement of his account with the plaintiff, made upon his own principles and position, showing the balance to be the above sum, and denying that any greater sum than that was due.

The court, on appeal, affirmed the order. It was precisely the case contemplated in the provision of the Code. The fact that the defendant had previously offered to pay the sum, if received in full, could make no difference.

APPENDIX.

A.—Page 210.

Touillier Droit Civil. Tome 3, p. 72, et. seq.

WATER PRIVILEGES.

131. There are three distinct conditions of water to be noticed: where it has its source upon an estate; where the stream crosses; and where it borders it.

By force of the rule that ownership of the soil carries the right to all that is above, water belongs to the owner of the land on which it has its source. Article 641 only announced a consequence of the right of property, when it says, "He who has a spring on his land can use it at his will."

132. Thus, he can keep its water to himself, and prevent its flowing on lands situated lower down, by digging basins to retain it, by ditches, ponds, or by any similar works he may see fit to construct.

He can alter the direction of its current, causing it to flow south where it had flowed north, provided only that the lands on which he turns the stream belong to him, or the proprietors do not object, for he cannot compel them against their wish to be burdened with a stream flowing contrary to its natural course. But if these consent, the proprietor of the land on which the water had flowed before, even from time immemorial following its natural direction, can not complain, unless he had acquired by title or prescription against the proprietor of the land above or servitude in its course.

133. When the Code was under discussion in the Council of State, this principle of Article 641 was objected to on the ground that water, like air and light, being common property, was not the subject of permanent ownership.

That nature has designed it for the use of all, and there could be acquired but a temporary property which lasted only as long as possession. As a consequence, the owner of land on which water flows, could

only claim a right of preference or as first occupant. After his wants were satisfied, the design and nature of water, justice, and public interests would not permit him arbitrarily to deprive others of the use of it.

This objection was not deemed valid, and with reason. Though true in principle, the application was erroneous.

There was no dispute as to the fact that the owner of an estate on which there is a spring has the first right to the use of its water. If he need all the water, he can retain it; and no one can object, for he alone can judge of the extent of his wants. Moreover, before the water has escaped from his land to run on that of another, no one has acquired any rights over it. He is at liberty to construct upon his land such works as he please.

If the owner do not retain all the water, it becomes, after leaving his land, common property.*

He cannot prevent any one from using it; but if from any reason he choose to make the stream leave his premises at the north instead of the south, the proprietor of the land below cannot prevent it, since the latter has no right to the water till it comes from the land above, unless acquired by title or prescription. Such a right would be a servitude as to which it will be seen, further on, what possession will create a prescription.

134. But, as public interests should always prevail over private, the owner of a spring cannot change its course when it furnishes the inhabitants of a commune, village, or hamlet with their necessary supply of water.

There is in such case a legal servitude, of which we will speak hereafter; but there must be a necessity, and even then compensation is to be made, the amount to be regulated by experts (643).

Thus, in a time of drought, when the water of a pond is necessary to the mills which supply a town with food, the owner of the pond must let the water run out, but he is to be paid at a fixed rate for each metre the water is thereby lowered.

This is frequently the case with the mills of Vilaine, which furnish food to Rennes.

135. The reasons for giving to the owner of a spring the right to divert or retain its water, may be urged by one through whose estate a stream runs.

He can use the stream as he may see fit while it crosses his land (644), and at first there appear no sufficient motives to prevent his retain-

* Blackstone, vol. 2, pp. 14 and 18.

ing the water or changing its flow. It is the exercise of an act of property, and the proprietors of the land below him have acquired no right over the water until it has left the land above. But the civil law, from motives of equity, is opposed to this claim.

If the proprietor of land through which a stream runs could divert or retain its water to the prejudice of the land below, the proprietor of the land above him would have the same right.

By forbidding both from changing the course of the water, the law protects alike their several rights of property by the very limitation it prescribes.

They can use the water in its flow through their property, make it circulate as they choose, but on condition of returning it to the ordinary channel on leaving their land.

If they dig ditches, canals, basins, or ponds large enough to diminish the volume of the water so as to cause marked injury to the lands below, the question will depend on the circumstances of each case.

Article 645 declares that if disputes arise between proprietors to whom the use of the water would be advantageous, the magistrates, in deciding, must endeavor to reconcile the interests of agriculture with the rights of property.

136. No appeal to the Court of Cassation can be taken from the decisions of the lower courts, as may be seen by two decisions rendered the same year, April 7th and July 15th, 1807, and which, though apparently contradictory, are based upon the same principle.

In the first case, one Bollet, through whose property a brook ran, by virtue of immemorial possession of the use of the water for the irrigation of his meadows, had constructed works to facilitate this irrigation.

The owners of two mills below complained. There was a lawsuit, in which it was established—

1st. That Bollet had diverted the water, by ditches ingeniously made, so as to procure for his fields an irrigation they very much needed.

2d. That the brook, insufficient in dry seasons to turn the mills below, was still further diminished by these irrigations, so advantageous to the proprietor.

3d. That there was no excavation on the estate of Bollet by which there could be loss of water.

4th. But that the use he had made of the water had injured the mills below.

Bollet was condemned to destroy his works and to restore the former condition of the stream. By a decree of the 27th Messidor, in the year XIII., the Court of Appeals of Dijon declared that the case had been de-

cided correctly, but gave Bollet the right to institute proceedings for the purpose of having regulated, with the parties interested, the manner of taking the water for the irrigation of his land.

By decree of the 7th of April, 1807, his appeal to the Court of Cassation was dismissed on the following grounds:

That, by Article 644 of the Code, proprietors whose lands are traversed by a stream can only use the water on condition of returning it, on issuing from their lands, to its ordinary bed; and that Bollet absorbed the water in such a manner that there resulted considerable injury to the manufactories below.

That also Article 645 assigns to the magistrates the duty of reconciling the interests of agriculture with the rights of property, and in making this decision they only exercised that function.

The second decree dismissed an appeal from a judgment of the Court of Appeals of Paris, which had decided that one Provence, whose estates were crossed by two streams which afterwards emptied into a pond belonging to one Berthelin, had a right to dig ditches and basins in which he collected their waters, although these works considerably diminished the quantity of water Berthelin's pond received, and even threatened to deprive it altogether of water in a season of drought.

But Provence returned the waters to their ordinary bed on issuing from his land, and the Court of Cassation considered that Article 644 gave to the proprietor of land, through which a stream flowed, the right to use it, on condition only of returning it to its ordinary bed.

That Article 645 assigns to the magistrates the duty of reconciling the interests of agriculture with the rights of property, in deciding disputes between proprietors who are interested in such waters.

That in the case under consideration, the water which crossed the estate of Provence, after he had used it, flowed in its usual course into Berthelin's pond; that thus the judgment appealed from was conformable to the provisions of the Articles cited.

It follows that in all such disputes there arise only questions of fact which the judges alone can pass upon, and that from their judgments no appeal lies to the Court of Cassation.

137. If the canals, basins, or ponds which retain the water and deprive the land below of their supply, existed a sufficiently long time to work a prescription, the neighboring proprietors lose the right to object, and the magistrates can order their destruction only on the ground of the interests of agriculture.

These basins or ponds are property, and are only to be sacrificed to the duly established public good, and compensation is to be made for them.

A law of 14th Fumaire, Year II., had directed the draining and cultivation of all ponds which it was usual to draw off for the purpose of fishing, and those whose waters were collected by dams and embankments, but it was repealed by another law of 13th Messidor, Year III.

By a law of 11th September, 1792, if the ponds, by stagnation of the water, might occasion epidemic or epizootic diseases; or, if from their situation they were sometimes liable to overflow and injure the lands below, the authorities of the Departments (now the Prefects or Council of the Prefecture) were authorized to direct their destruction, at the request of the municipal authorities, with the approval of the under Prefect. But the proprietors must be first compensated.

138. If private individuals cannot direct the destruction of ancient ponds, they can oblige the owner to keep the banks and outlets in such a condition that they cannot be thereby injured.

If the owner neglects to repair them he is responsible for all damages that may be occasioned by the water breaking out.

This would not be a case of *vis major*. As the injury would arise from the negligence of the owners, on them the loss should fall.

A neighbor, on discovering the bad condition of a pond, can notify the owner to repair it, but, independently of this notice, he can recover damages and interest if able to prove that the injury was caused by the condition. This is a just consequence of Article 1,383 of the Civil Code.

But the riparian owners cannot object if the water cover their lands in extraordinary freshets. This is a servitude that the owner of the pond has acquired by prescription. He is only responsible for transient inundation in case he has increased the height of its banks or of its place of discharge, of which the riparian owner can always demand the reduction to its former height; if there arise disputes as to this, the administrative authorities are to fix this elevation, as well as that of the sluices of mills.

139. The owner of a pond retains his right to the land the water covers when at the height of its discharge, although the water should be lowered (558), as in seasons of drought, and the riparian owners acquire no right to use this land which the law preserves to the pond-owner.

The occupation of this land by cutting grass and pasturing cattle, can only be precarious, and they acquire no legal right thereby.

For the same reason, there is no alluvion in favor of the riparian owners of a pond.

140. But if the source of the pond be not on the land of the proprietor of the pond, he cannot, more than any other through whose land

a stream runs, direct its water, wholly or partially, without returning it to its ordinary channel. The magistrates cannot authorize this even under pretext of the interests of agriculture, without contravening Article 644.

141. One whose property borders on running water other than rivers and streams that are navigable or floatable, can avail himself of the water to irrigate his land (644).*

His right is restricted to this *employment* of the water. It is not as extensive as that of a proprietor of land crossed by running water who can even use the water—a strong expression which Article 644 employed in opposition to availing himself of it for irrigation.

It is especially with regard to water running between different estates, that the magistrates, in deciding disputes arising between the proprietors, are to reconcile the interests of agriculture with proprietary rights.

142. In every case the special and local regulations as to the course and use of water in general, where any exist, should be observed (645).

143. But where none exist, to whom does it belong to make these regulations?

A distinction is to be observed; if only disputes between individuals are to be passed upon, and the regulating and limiting their use of the water to be settled, it belongs to the magistrates to decide.

But if measures of police are to be taken with regard to a stream, such as directing its clearing out or causing any work to be done upon it either to facilitate its flow or to prevent its being an injury to the public, the courts of justice become incompetent and Government alone can act.

144. Proprietors have not only the right to the water of streams which flow through or bound their estates; they have, besides, the exclusive right of fishing in them, with the exception of rivers and streams that are navigable or floatable.

Some Communes have claimed that the right to fish in non-navigable rivers should belong to them, but the Council of State were of opinion that their claim should be disallowed, and this view was embodied in a decree of 30th Pluviose, Year XIII., printed in the Bulletin de Lois.

The grounds of this opinion were, that feudal rights, of which fishery

* But this right to take water ceases if the non-navigable stream or brook changes its bed and flows on the land of a neighbor. The proprietor of the land which the water has abandoned, cannot make a channel across the old bed in order to re-establish his connection with the water.

See the Decree of the Court of Cassation, 11th February, 1811. Sirey, vol. 15, p. 100.

was one, were not abolished in favor of Communes, but of the vassals, who became free not only in their persons, but in their property, and that the grant to the Communes, of the right of fishery in non-navigable streams, would be, on the property of individuals, a servitude unknown to the civil law.

Thus, the right of fishing in non-navigable rivers, belongs to the riparian owners, but they can only exercise this right in conformity with the laws or local regulations concerning fisheries, nor can they retain it in case of a river becoming navigable.

The bed of non-navigable rivers belongs also to riparian owners, not to the Communes.

145. The administrative authorities are to decide if a river is navigable or floatable since they are to determine by what indications public property is to be recognized.

146. Although rivers and navigable or floatable streams are dependencies of the public domain, the law of October 6th, 1791, in relation to the rural police, gave every riparian owner the right of taking water, provided the stream was not changed or interfered with in a manner detrimental to the public welfare or to established navigation.

But this Article is impliedly repealed by Article 644 of the Code, which gives this right in case of running streams other than those declared dependencies of the public domain.

I N D E X .

[The Author has been essentially aided in making this Index by AMASA A. REDFIELD, Esq., of the New York Bar.]

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